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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-320

GERALDINE L. LIGHTENBURGER, *et al.*, *Petitioners*,
v.
UNITED STATES OF AMERICA, *Respondent*.

IVORY COMBS and NORTH AMERICAN AVIATION, INC., *Petitioners*,
v.
UNITED STATES OF AMERICA, *Respondent*.

JOAN GORDON, *et al.*, and EDITH CARRINGTON, *Petitioners*,
v.
UNITED STATES OF AMERICA, *Respondent*.

EAGLE STAR INSURANCE CO., *Petitioner*,
v.
UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on April 27, 1972.

OPINION BELOW

The opinion of the Court of Appeals is not yet reported. The opinion of the District Court for the Central District of California is reported at 298 F. Supp. 813 (1969). Both opinions appear in the Appendix hereto.[1]

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on April 27, 1972. Timely petitions for rehearing, filed by Eagle Star and by the plaintiffs in *Lightenburger* and *Gordon* and *Carrington*,[2] were denied on May 26, 1972. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Are Federal Aviation Administration safety regulations requiring the FAA flight controller to instruct the pilot of an aircraft to "climb immediately" when such aircraft has dropped below the safety zone to a point where, in the controller's judgment, the safety of the flight is likely to be affected, intended only to prevent collision by such aircraft with buildings or other fixed objects on the ground?

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[1] References herein to "App." are to the Appendix.

[2] No petition for rehearing was filed by North American and Combs (No. 24855 in the Court of Appeals). Since all cases arise out of a common accident and turn on identical issues, North American and Combs are included in this petition in the interests of justice. *Gondeck v. Pan American Airways*, 382 U.S. 25 (1965).

2. In a case arising under the Federal Tort Claims Act, requiring (28 U.S.C. §1346(b)) application of the law of the place where the negligent act occurred (California), did the Court of Appeals err in holding, contrary to the law of California, that there was "no causal connection" between the crash of an aircraft and the negligent failure of the FAA flight controller, guiding the landing approach of that aircraft, to comply with mandatory, federally prescribed air safety regulations requiring, in the circumstances then existing, that the controller instruct the pilot to "climb immediately," because the precise manner in which the crash occurred was not foreseeable?

STATUTORY PROVISIONS INVOLVED

UNITED STATES CODE, TITLE 28

§1346. United States as defendant

* * * * *

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

FEDERAL AVIATION ACT OF 1958

Title I – General Provisions

Definitions–

Section 101. [72 Stat. 737, as amended by 75 Stat. 467; 49 U.S.C. 1301] as used in this Act, unless the context otherwise requires–

* * * * *

(4) "Air commerce" means interstate, overseas, or foreign air commerce or the transportation of mail by aircraft or any operation or navigation of aircraft within the limits of any Federal airway or any operation or navigation of aircraft which directly affects, or which may endanger safety in, interstate, overseas, or foreign air commerce.

(7) "Airman" means any individual who engages, as the person in command or as pilot, mechanic, or member of the crew, in the navigation of aircraft while under way; and (except to the extent the Administrator may otherwise provide with respect to individuals employed outside the United States) any individual who is directly in charge of the inspection, maintenance, overhauling, or repair of aircraft, aircraft engines, propellers, or appliances; and any individual who serves in the capacity of aircraft dispatcher or air-traffic control-tower operator.

(8) "Air navigation facility" means any facility used in, available for use in, or designed for use in, aid of air navigation, including landing areas, lights, any appartus or equipment for disseminating weather information, for signaling, for radio-directional finding, or for radio or other electrical communication, and any other structure or mechanism having a similar purpose for guiding or controlling flight in the air or the landing and take-off of aircraft.

Title III – Organization of Agency and Power and Duties of Administrator

* * * * *

Airspace Control and Facilities

Sec. 307. [72 Stat. 749; 49 U.S.C. §1348]

Use of Air Space

(a) The Administrator is authorized and directed to develop plans for and formulate policy with respect to the use of the navigable airspace; and assign by rule, regulation, or order the use of the navigable airspace under such terms, conditions, and limitations as he may deem necessary in order to insure the safety of aircraft and the efficient utilization of such airspace. He may modify or revoke such assignment when required in the public interest.

Air Navigation Facilities

(b) The Administrator is authorized, within the limits of available appropriations made by the Congress, (1) to acquire, establish, and improve air-navigation facilities wherever necessary; (2) to operate and maintain such air-navigation facilities; (3) to arrange for publication of aeronautical maps and charts necessary for the safe and efficient movement of aircraft in air navigation utilizing the facilities and assistance of existing agencies of the Government so far as practicable; and (4) to provide necessary facilities and personnel for the regulation and protection of air traffic.

Air Traffic Rules

(c) The Administrator is further authorized and directed to prescribe air traffic rules and regulations governing the flight of aircraft, for the navigation,

protection, and identification of aircraft, for the protection of persons and property on the ground, and for the efficient utilization of the navigable airspace including rules as to safe altitudes of flight and rules for the prevention of collision between aircraft, between aircraft and land or water vehicles, and between aircraft and airborne objects.

REGULATIONS INVOLVED

At all times pertinent to this litigation, the following regulations were applicable:

CIVIL AIR REGULATIONS

14 C.F.R., Sec. 26.26 (as revised January 1, 1961):

A certificated air traffic control tower operator shall control traffic in accordance with the procedures and practices as prescribed in the appropriate air traffic control manuals of the Federal Aviation Agency to provide for the safe, orderly and expeditious flow of air traffic . . . :

* * * * *

AIR TRAFFIC CONTROL PROCEDURES MANUAL

344 Precision Approaches

* * * * *

344.9 If an aircraft exceeds the lower and/or lateral limits of the prescribed safety zone to a point where, in the judgment of the controller, safety of flight is likely to be affected, the pilot shall be instructed to climb to a specified altitude and fly a specific course, as appropriate.

* * * * *

390 Phraseology

* * * * *

394 Precision Approaches

* * * * *

394.7 To instruct a pilot to discontinue approach when the aircraft exceeds safety limits: IF RUNWAY NOT IN SIGHT, CLIMB IMMEDIATELY TO (altitude), TURN LEFT/RIGHT, HEADING (degrees), (reason and further clearance, if appropriate), ACKNOWLEDGE.

STATEMENT OF THE CASE

These actions, brought under the Federal Tort Claims Act, 28 U.S.C. § 1346(b), to recover damages for wrongful death, personal injuries and property damage due to negligence of the Federal Aviation Administration (hereinafter FAA) and its employees, arise out of the crash of a Cessna 310-G, a light-weight, private aircraft, at the Los Angeles International Airport on December 6, 1962. The aircraft crashed and burned; the pilot, Gordon, and his passengers, Lightenburger and Carrington, were killed; property of North American Aviation, Inc. (into which the Cessna crashed) was severely damaged, and Combs, a North American employee, was injured. The actions were brought by the families of the deceased, by Eagle Star, the Cessna's insurer, by North American and by Combs.

Gordon, a licensed and well-qualified pilot, in full compliance with all applicable FAA regulations, was approaching Los Angeles International Airport, intending to land. Weather conditions were bad, necessitating an instrument approach. Gordon, as was his right under the applicable regulations and procedures, requested a "full radar approach". Gordon was thereupon placed under the

control of a Precision Radar Approach (PAR) Controller, an employee of FAA, whose duty it became to track the aircraft by radar and to inform the pilot of his position in relation to an established landing glide path so that the pilot might be guided to the minimum height (i.e., his "minimums" under the applicable FAA procedures) at which a decision would be made whether to land or to abort the landing and execute a "missed approach" (FAA terminology for the procedure whereby a pilot unable to land flies his aircraft away from the airport). The decision to land or to execute a missed approach turns on whether at that point the pilot has sufficient visibility of the runway.[3]

A "full" or "Precision Radar Approach" is to be distinguished from the more common instrument landing approach (ILS). Under ILS, the pilot is guided by reference to instruments in the aircraft combined with supplemental advisories from the radar controller in the tower. Under PAR, primary reliance for guidance to minimums is placed upon the radar controller, and the pilot flies his aircraft without visual reference, relying on the controller for the proper course of the aircraft down the glide-slope.

As Gordon approached from the point where he had been placed under PAR to about one-half mile from the

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[3] "Minimums" for the runway involved were "200 and one-half", meaning that to proceed with a landing a pilot must, upon descending to an altitude of 200 feet, have one-half mile of forward visibility. However, if at that point the pilot's view of the runway was obscured but the pilot was free of clouds, he also had, under FAA regulations, a right to descend an additional 50 feet to have a "look-see". The District Court found that there was no negligence or breach of regulations by the pilot in making his approach. The Court of Appeals did not disturb this finding.

point on the runway where he was to land ("touchdown", in the FAA terminology), he was observed on radar by the PAR Controller to be within the glidepath.

By that time, visibility at ground level was practically nonexistent. A low-lying fog bank hovered over the approach end of the runway. As the Cessna approached to within less than one-half mile of touchdown, the PAR Controller observed on the radarscope that the aircraft had descended 25 feet below the glidepath.

At that point, although the pilot's conduct of his approach had been in compliance with the regulations, the PAR Controller felt the safety of the flight was likely to be affected because of lack of altitude coupled with doubt on his part that the pilot could see the runway.

In these circumstances, Section 344.9 of the Air Traffic Control Procedures Manual requires the PAR Controller to instruct the pilot "to climb to a specified altitude and fly a specific course", in specific language mandated by Section 394.7 of the same manual, as follows:

> To instruct a pilot to discontinue approach when the aircraft exceeds safety limits: IF RUNWAY NOT IN SIGHT, CLIMB IMMEDIATELY TO (altitude), TURN LEFT/RIGHT, HEADING (degrees), (reason and further clearance, if appropriate), ACKNOWLEDGE.

Instead of the required instruction, the PAR Controller gave an entirely different instruction:

> * * * going twenty five feet below the glide path adjust descent take over and complete your landing visually on runway two five left if you're not ah contact execute a missed approach climb westbound to VFR conditions on top.

In a missed approach situation, a pilot, absent other instructions from the PAR Controller, has the option of climbing immediately or maintaining altitude in order to gain speed in level flight before executing a climb. The District Court's findings, undisturbed by the Court of Appeals, were that the pilot chose the latter course, that in so electing he was executing a standard missed approach procedure and that he was not himself negligent.

Immediately upon the erroneous instruction, the Cessna was observed on radar (visual sighting being impossible from the ground observation points) to continue for 30 seconds in level flight at an altitude of 150 feet down the runway for approximately 3,000 feet (1,500 feet beyond touchdown). At that point, the Cessna made a sudden, violent 210-degree turn, within a 500-foot radius, and crashed downward into North American's parking lot.

The Cessna's violent maneuver was beyond the physical control capabilities of the aircraft. The Court of Appeals accepted the District Court's finding that the most reasonable explanation for the Cessna's violent, final maneuver was the effects of encountering a physical phenomenon known as wing tip vortices—an encounter which could not have occurred had the Cessna been properly instructed by the PAR Controller to climb immediately. An immediate climb would have carried the Cessna above the zone in which the vortices lay. While the government contended, both at trial and on appeal, that it was physically impossible for vortices to have persisted until the time of the crash, and hence that they could not have been encountered by the Cessna, it agreed with plaintiffs that had the Cessna climbed immediately

upon receiving the last instruction given by the PAR Controller, the crash would not have occurred. (App. F & G). This, of course, is tantamount to recognition that the instruction was causally connected with the crash.

Wing tip vortices form when a heavy aircraft, flying at slow speed, accelerates. The passage of the wing through the air causes a roll-up of the air mass at the tip of each wing. The air masses swirl much in the fashion of a horizontal tornado.

The District Court found that the vortices had formed 12 minutes before the crash in the course of a missed approach by a Boeing 707, which at the time was at an altitude of 200 feet.

On appeal, the Court of Appeals, while accepting the District Court's findings of fact regarding both the existence and 12-minute persistence of the vortices, held that a persistence of that duration "was both improbable and unforeseeable". (App A, at 8a)[4]

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[4]In stating that the government contended "that the wing tip vortices were an unforeseeable and intervening cause of the accident", (App. A, at 7a), the Court of Appeals misconceived the government's position. The government made no such claim. The government's position was simply that no vortices could have persisted for 12 minutes. It offered no explanation for the Cessna's final, violent maneuver, contending instead that the pilot was negligent in seeking to land in the face of inclement weather and that in any event, the crash was due to his alleged negligent execution of a missed approach following the last directive from the PAR Controller, i.e., that he disobeyed the PAR Controller's final instruction by proceeding, as he did, in level flight for the ensuing 30 seconds instead of climbing promptly. The failure to climb immediately is what was claimed by the government to constitute "an independent intervening act which was not foreseeable." (App. F at 2f) However, it is inapposite to equate claimed contributory negligence, even had it been found to exist,

Plaintiffs advanced four grounds of liability, each independent of the other.[5] All were adopted by the District Court but were rejected by the Court of Appeals. It is with that Court's rejection of the fourth ground of liability that this petition is concerned.

The fourth ground of liability was that "the Par Controller Was Negligent in Failing to Give the Instruction Required by the Air Traffic Control Procedures Manual, § § 344.9 and 394.7."

The District Court found that the Controller was negligent in failing to give the prescribed instruction. The Court of Appeals, assuming the correctness of that finding without re-examination, held, on the basis of its conclusion that a 12-minute vortex persistence was not reasonably foreseeable, that "there were no causal connection between such negligence and the crash."

There is no indication in the opinion of the Court of Appeals that in reaching this conclusion it followed the mandate of the Federal Tort Claims Act, 28 U.S.C. §1346(b), to apply the law of the state where the crash occurred.

Although the opinion of the Court of Appeals on the fourth ground of liability rests on lack of causal connection between the Controller's violation of the Manual and the ensuing crash, there is at least a suggestion in the court's modification of its opinion, on rehearing, that it may have considered that the PAR Controller's violation of Sections 344.9 and 394.7 did not breach any duty owned the pilot.

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with an independent intervening cause, thereby breaking the chain of proximate causation between the PAR Controller's negligence and the crash. Prosser, *Proximate Cause in California*, 38 CALIF. L. REV. 369, 417 (1950).

[5]Grounds one and two are set out at App. A, at 7a. Grounds three and four are set out at App. A, at 12a.

In its order denying the petitions for rehearing (App. C, at 2c), the Court of Appeals revised its original opinion to state that the purpose of the directive embodied in Section 344.9 of the Manual (which calls into operation the mandatory "climb immediately" instruction prescribed by Section 394.7 of the Manual) is "to prevent low-flying planes from colliding with buildings or other fixed objects on the ground."

The attribution of such a constructed purpose to Section 344.9 is warranted neither by the language of the directive itself nor by the record. There is, as the District Court observed, a variety of collision hazards at low altitude to which an aircraft is exposed by negligent failure to direct an immediate climb. One such hazard is, of course, another low-flying aircraft. Another is the ground itself. A third such obvious hazard is lack of air space in which a pilot may recover from a sudden temporary loss of control, whatever its source.

As the PAR Controller testified at trial, when an aircraft under PAR control is under the safety limits west of the half-mile point (i.e., less than one-half mile from touchdown), the risk to safety of the flight would be greater because the aircraft would then be physically closer to the ground. (App. 0000). "Buildings or other fixed objects" are only one of many hazards which could imperil a low-flying aircraft being guided to minimums in zero-zero visibility. Wing tip vortices close to the ground have been held to be obstructions to an aircraft colliding therewith, notwithstanding that they do not possess the physical properties of a solid mass such as a building. *Wasilko v. United States*, 300 F. Supp. 573, 594 (N.D. Ohio 1967), *aff'd*, 412 F.2d 859 (6th Cir. 1969). To confine the "safety of flight" concept, with which

Sections 344.9 and 394.7 are concerned, to the narrow limits of physical objects on the ground is hardly consonant with the policy enunciated in Section 307 of the Federal Aviation Act of 1958.

REASONS FOR GRANTING THE WRIT

I.

THE NARROW CONSTRUCTION OF SECTION 344.9 BY THE COURT BELOW EMASCULATES A FEDERAL REGULATION PRESCRIBED FOR THE SAFETY OF LOW-FLYING AIRCRAFT.

By the Federal Aviation Act of 1958, the Congress prescribed a sweeping and pervasive assumption by the federal government of supervision over all aspects of civil aviation. The 1958 Act arose out of the shortcomings of previous federal air safety systems. *See* S. Rep. No. 1811, 85th Cong., 2d Sess. 7 (1958). The need intended to be met by the 1958 Act was the establishment of "a well planned system, operated by qualified technicians working within the framework of rules devised to provide safety features necessary for modern-day air operations." H.R. Rep. No. 2360, 85th Cong., 2d Sess. 7 (1958). As the Second Circuit has aptly stated:

> While air travel in this jet age has become commonplace, we know too well that there is always lurking the possibility of tragic accidents capable of snuffing out the lives of hundreds in a mere matter of seconds. Much of the success in preventing such disasters can be attributed to the federal government's assumption of the supervision of commercial flying; and public confidence in air travel has been fostered in large measure by knowledge that our government, recognizing the high stakes involved, is

> constantly overseeing the carrier's operations in order to promote safety.

Ingham v. Eastern Air Lines, Inc., 373 F.2d 227, 235-36 (2d Cir.), *cert. denied, United States v. Ingham*, 389 U.S. 931 (1967).

These principles underpin this case. It is difficult to imagine a greater dependency by air travelers and pilots on the federal government's air traffic control system than in the case of an aircraft, in inclement and deteriorating weather, attempting a PAR landing approach. A government witness, himself an experienced FAA official, testified that the only guidance the pilot has is the PAR Controller and that if the Controller makes a mistake, it is not the pilot's fault (App. E, at 40e).

It is obvious that the threat to safety of flight envisioned in Section 344.9 of the Manual, in the case of an aircraft making a PAR landing approach and determined by the PAR Controller to be below the prescribed safety zone in zero-zero conditions, is the likelihood of a crash if the aircraft does not immediately climb.

In essence, the case is this: The pilot was being guided to minimums by the PAR Controller. The PAR Controller could not see the aircraft and feared that the pilot could not see the runway. The Controller considered that the safety of the flight was imperiled. The obvious peril was a crash because of the low altitude. The Controller, nevertheless, failed to give the instruction, prescribed in those very circumstances, to climb immediately, Instead, he gave a different instruction, one which did not mandate an immediate climb. The feared peril became a reality; the plane crashed.

In these circumstances, for the court below to say that Section 344.9 of the Manual was intended only to protect against a crash resulting from a particular kind of collision—with a building or other fixed objects on the ground—is to sanction carelessness in the operation of a system of air safety controls in which meticulous observance of the rules is essential to the avoidance of catastrophe.

The public interest in the application by the government of its own regulations in the critical area of air safety in a manner consistent with the statutory purpose of preventing air disasters (Federal Aviation Act of 1958, §307, 49 U.S.C. §1348) warrants this Court's review of the narrow interpretation placed upon Section 344.9 of the Air Traffic Control Procedures Manual by the Ninth Circuit.

II.

IN FINDING NO CAUSAL CONNECTION BETWEEN THE PAR CONTROLLER'S VIOLATION OF THE "CLIMB IMMEDIATELY" SAFETY REGULATIONS AND THE CRASH, THE COURT OF APPEALS ASSUMED, CONTRARY TO CALIFORNIA LAW, THAT THE PRECISE MANNER IN WHICH THE CRASH OCCURRED HAD TO BE FORESEEABLE.

Since these cases arise under the Federal Tort Claims Act, the liability of the United States is to be determined "in accordance with the law of the place where the act or omission occurred." 28 U.S.C. §1346(b). *Richards v. United States*, 369 U.S. 1 (1962).

A. Under California Law, Proximate Causation Exists when the General Type of Harm Flowing from a Negligent Act Is Foreseeable Even Though the Specific Manner in which the Harm Comes About Is Not Foreseeable.

The fourth ground of liability found by the District Court rested upon the conclusion that the PAR Controller was negligent in failing to give the precise instruction mandated by Section 394.7 of the Air Traffic Control Procedures Manual when he concluded, per Section 344.9 of the Manual, that the safety of the flight was jeopardized. The District Court's finding of liability can be sustained on the basis that the general type of risk to which the PAR Controller's negligence exposed the small aircraft (risk of a crash because of insufficient altitude) was reasonably foreseeable—indeed, that possibility was conceded by the PAR Controller.[6] It was not necessary to this ground of liability to find that wing tip vortices from the preceding aircraft be specifically foreseeable as the potential physical cause of the crash.[7] To the contrary, under settled California law, it was sufficient to support liability that the District Court find, as it did, that the general type of harm to which the air safety regulations are directed was foreseeable by the PAR Controller.

California holds that proximate cause does not require specific foreseeability of the precise type or physical

[6] "He [the Controller] admitted that, when the target was further west of the half mile point, the risk to the safety of the flight would be greater because the plane is physically closer to the ground. . . ." App. E, at 40e.

[7] That the District Court also found foreseeability as to vortices does not invalidate its holding of liability based upon the PAR Controller's negligence in failing to give the "climb immediately" instruction. *Minneapolis & St. Louis Ry. v. United States*, 361 U.S. 173 (1959).

cause of accident which in fact occurred, but rather requires only that the general type of harm be foreseeable.

> It is true that the conception of proximate cause involves an element of foreseeability. But what does this mean? It does not mean that the precise or intended consequence should have been foreseen. Foreseeability does not mean foreseeability of the actual consequences. It simply means foreseeability in the terms of causation. If the conduct of the person sought to be charged is a substantial factor in bringing about the harm, the fact that he neither foresaw nor should have foreseen the extent or nature of the harm, or the manner in which it occurred, does not prevent him from being held liable. (See many cases collected and commented on in 35 Cal. Jur. 2d p. 552, §55).

Parker v. City and County of San Francisco, 158 Cal. App. 2d 597, 607 (1958).

This principle—reflected in the Second Restatement of Torts, section 442B—has been concisely enunciated in *Petition of Kinsman Transit Company*, 338 F.2d 708 (2d Cir. 1964). There, the court stated, at pages 723-24:

> . . . [W]e would find it difficult to understand why one who had failed to use the care required to protect others in the light of expectable forces should be exonerated when the very risks that rendered his conduct negligent produced other and more serious consequences to such persons than were fairly foreseeable when he fell short of what the law demanded. Foreseeability of danger is necessary to render conduct negligent; where as here the damage was caused by just those forces whose existence required the exercise of greater care than was taken . . . , the incurring of consequences other and greater than foreseen does not make the

conduct less culpable or provide a reasoned basis for insulation.

* * * * *

> The weight of authority in this country rejects the limitation of damages to consequences foreseeable at the time of the negligent conduct when the consequences are "direct," and the damage, although other and greater than expectable, is of the same general sort that was risked.

And see *Hall v. Macco Corp.*, 198 Cal. App. 2d 415, 423 (1961):

> The question to be decided by the jury was not whether defendant did foresee, or by the exercise of ordinary care would have foreseen, the identical consequences that happened, in order that its negligence be a proximate cause of the injury. The question was whether it was reasonably foreseeable that injury was likely to occur. (*Werkman v. Howard Zinc Corp.*, 97 Cal. App. 2d 418, 425 [218 P.2d 43]; *Osborn v. City of Whittier*, 103 Cal. App. 2d 609, 615 [230 P.2d 132].)

Thus, accepting *arguendo* the Court of Appeals' conclusion that the PAR Controller could not reasonably have specifically foreseen the existence of wing tip vortices, he could, and should, have foreseen a general risk of harm to the Cessna from such factors as weather conditions generally, visibility, the plane's flight path and sudden loss of control, coupled with the aircraft's proximity to the ground.

This crucial distinction was ignored by the Court of Appeals in holding that there was lack of causal connection between the PAR Controller's negligence in

not giving the warning in the precise terminology required and the crash.[8]

B. Under the Law of California, Foreseeability as an Element of Proximate Cause, as well as Proximate Causation Itself, Are Peculiarly Issues To Be Resolved by the Trier of Fact.

> Questions of foreseeability and proximate cause are for the jury, and where there is any evidence to support the jury's finding, an appellate court will not reweigh this evidence. *Jones v. City of South San Francisco*, 96 Cal. App. 2d 427, 435; *Richardson v. Ham*, 44 Cal.2d 772, 775-777.

Thornton v. Luce, 209 Cal. App. 2d 542, 548 (1962). See, also, *Schwartz v. Helms Bakery*, 67 Cal.2d 232, 244 (1967); *Williams v. Lambert*, 201 Cal. App. 2d 115, 119 (1962); *Di Muro v. Masterson Trusafe Steel Scaffold Co.*, 193 Cal. App. 2d 784, 794 (1961). The same principle has been accepted and applied by the Ninth Circuit. *Waterman Steamship Corporation v. Gay Cottons*, 414 F.2d 724, 735, n. 27 (9th Cir. 1969).

Given the existence of and factual support for the District Court's finding, the reversal was clearly erroneous because it conflicted with the well-established principle of appellate review that lower court findings on issues of fact are not to be set aside unless reasonable minds cannot differ.

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[8] As noted *supra*, at 10-11, the Court of Appeals so held despite the government's concession that but for the pilot's failure to climb immediately, the crash would not have occurred. The government contended that the pilot, by not climbing immediately, violated the Controller's final instruction and, therefore, was guilty of contributory negligence. This argument is itself a recognition that the instruction was causally and proximately connected with the crash. *See* note 4 *supra*.

This principle is firmly established in California law. See, *e.g.*, *Thornton*, *supra*, and *Di Muro*, *supra*. And it is fundamental also to appellate review in the federal courts.

> Rule 52(a) of the Federal Rules of Civil Procedure instructs reviewing courts to pay due regard to the opportunity of the trial court to judge the credibility of witnesses, and enjoins the setting aside of findings of fact except where "clearly erroneous." . . . And it is now settled that in reviewing the record we are not to retry the issues of fact nor to supplant the district court's judgment with that of our own.

Smith v. James Irvine Foundation, 402 F.2d 772, 774 (9th Cir. 1968). See, also, *Seligson v. Roth*, 402 F.2d 883, 886 (9th Cir. 1968). The principle has particular application to a finding of proximate cause:

> Had we been present at the trial, we might not have found as the trial court did on the issue of proximate cause. However, we are not left with a definite and firm conviction that the trial court erred in finding as it did on that issue. See *Guzman v. Pichirilo*, 369 U.S. 698, 702, 82 S.Ct. 1095, 8 L.Ed. 2d 205.

United States v. Soriano, 366 F.2d 699, 704 (9th Cir. 1966).

III.

THE COURT OF APPEALS DENIED PETITIONERS THEIR CONGRESSIONALLY MANDATED RIGHT TO AN ADJUDICATION BASED UPON STATE LAW

The opinion of the court below, without explanation, failed to consider and apply California law on the issue of causal connection. Petitioners were thereby denied consideration of their claims in accordance with the substantive law prescribed by Congress.

In enacting the Federal Tort Claims Act, Congress prescribed the policy that the federal government's liability for tortious conduct be judged by the standards applicable to private persons in the jurisdiction where the tortions conduct occurred. *Richards v. United States*, 369 U.S. 1, 7 (1962). The Court of Appeals' opinion disregards that policy by applying a rule more favorable to the government. This Court should require the federal judiciary to adjudicate Federal Tort Claims Act cases in accordance with the Congressional mandate that state law be followed.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GERALDINE L. LIGHTENBURGER, et al.,
Appellees,
v.
UNITED STATES OF AMERICA,
Appellant.
No. 24854

IVORY COMBS and NORTH AMERICAN AVIATION, INC.,
Appellees,
v.
UNITED STATES OF AMERICA,
Appellant.
No. 24855

JOAN GORDON, et al., and EDITH CARRINGTON,
Appellees,
v.
UNITED STATES OF AMERICA,
Appellant.
No. 24856

EAGLE STAR INSURANCE CO.,
Appellee,
v.
UNITED STATES OF AMERICA,
Appellant.
No. 24857

[OPINION OF THE COURT]

Appeal from the United States District Court
for the Central District of California

(Filed April 27, 1972)

Before: MERRILL and HUFSTEDLER; Circuit Judges, and SOLOMON, District Judge.*

SOLOMON, District Judge:

James Gordon, Bervial Carrington, and Dale Lightenburger were killed when their twin-engine private plane crashed into the North American Aviation facilities at Los Angeles International Airport (L.A. Airport). The crash and fire which followed seriously injured Ivory Combs, a North American ground employee, and heavily damaged the North American facilities.

Appellees are Ivory Combs, North American Aviation, Inc., Eagle Star Insurance Co., as subrogee for the destroyed aircraft, and the families of the three fatally injured occupants of the plane. They filed these actions under the Federal Tort Claims Act, Title 28 U.S.C. §1346(b), to recover for wrongful death, personal injuries and property damage which resulted from the crash.

The District Court (Court) consolidated the actions and found in favor of all appellees. *Lightenburger v. United States*, 298 F. Supp. 813 (C.D. Cal. 1969). The United States appealed.

Shortly after 2:00 P.M. on December 6, 1962, Gordon and his business associates, Lightenburger and Carrington, left McCarran Field in Las Vegas to attend a business

*Honorable Gus J. Solomon, United States District Judge for the District of Oregon, sitting by designation.

meeting in Los Angeles. With Gordon at the controls of his new Cessna 310G, they flew under an instrument flight plan which gave L.A. Airport as the prime destination and Burbank Airport as an alternate destination.

As the plane approached Los Angeles, Gordon requested and received clearance to land at Santa Monica Airport. Gordon flew over Santa Monica, but returned to L.A. Airport when he found Santa Monica closed because of bad weather.

At 3:52 P.M., Gordon made contact with the Los Angeles Approach Radar Control (AR-1) and learned that the weather conditions were poor. In spite of repeated reports of deteriorating visibility, Gordon elected to land at the L.A. Airport. At 3:58 P.M., visibility was one-half mile with smog and haze. At 3:59 P.M., AR-1 informed Gordon that the runway visual range (RVR) was 1200 feet. Gordon replied that he wanted a full radar approach, which AR-1 acknowledged. On the same radar frequency as Gordon, AR-1 informed a United Airlines jet that the pilot of an American Airlines Boeing 707 ahead of the United flight had executed a missed approach[1] when he could not see Runway 25 Left (the runway) at minimums.[2] The United pilot elected to wait for better conditions before attempting to land and so informed the tower.

At 4:01 P.M., AR-1 told the United flight to climb to 4,000 feet and told Gordon to turn left on his approach.

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[1]The procedure by which a pilot accelerates his airplane to climb away from an attempted landing, when he decides that the landing is unsafe or impossible.

[2]The point on the landing approach path at which a pilot decides to land visually or to execute a missed approach. Minimums on Gordon's approach was at an altitude of 200 feet.

Gordon acknowledged the message. At 4:04, AR-1 placed Gordon under the control of a Precision Radar Approach (PAR)[3] Controller who established contact with Gordon at 4:05. At that time Gordon was seven miles from touchdown.

The PAR Controller gave Gordon a heading and an RVR measurement of 1,000 feet. The PAR Controller also informed Gordon that, "this approach will be terminated at the middle marker[4] one-half mile from touchdown."

At 4:06 P.M., the PAR Controller informed Gordon that the RVR was less than 1,000 feet and that he was about to intercept the glide path at a point four and three-quarters miles from touchdown. From that point to a point one mile from touchdown, Gordon stayed on or near the glide path.

When Gordon was three miles from touchdown, the PAR Controller informed him, "latest weather indefinite ceiling zero sky obscured visibility zero with fog RVR less than 1000 feet." Shortly thereafter, PAR asked, ". . . do you plan [unintelligible] an approach with this weather or do [unintelligible] land with this weather." Gordon responded, "Ah put me right down on the runway."

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[3]A procedure by which a controller with the aid of radar informs approaching pilots of their position in relation to an established landing glide path so that the pilot may be guided to minimums and visual contact with the runway.

[4]A point one-half mile from touchdown on the glide path of the PAR approach to Runway 25 Left at Los Angeles International Airport.

When Gordon was one mile from touchdown, the PAR Controller told him that he was a few feet above the glide path. At 4:10, when the Cessna was one-half mile from touchdown, the PAR Controller stated:

> "Now oh ah fifteen feet from the glide path still a half mile from touchdown turn right one degree two five zero you're lined up with the left shoulder of the runway you passed the middle marker now coming up over the highway and going twenty five feet below the glide path adjust descent take over and complete your landing visually on runway two five left if you're not ah contact execute a missed approach climb westbound to VFR conditions on top."

Air Surface Radar Detection observed the plane flying over the runway for 3,000 feet at an altitude of about 150 feet.[5] At approximatly 4:12, the plane made a sudden violent 210 degree turn and crashed downward into a parking lot of North American Aviation facilities.

Gordon, Carrington and Lightenburger were killed. The plane crash and resulting fire injured Ivory Combs, who was working near the site of the crash, and it damaged North American Aviation, Inc., property. The Cessna was completely destroyed.

At the time of the crash, Burbank Airport was reporting a two-mile visibility, and Long Beach Airport a three-mile visibility. The Cessna still had more than four hours of fuel.

The Court found that the accident was caused by violent turbulence over Runway 25 Left, created by a previous missed approach of an American Airlines Boeing

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[5] This was approximately 1500 feet beyond touchdown.

707 over the runway at 4:00 P.M., which was at least 10 minutes before Gordon began his approach and 12 minutes before his plane crashed. This turbulence, called wing tip vortex, was described by the Court:

> "When a heavy aircraft flying at slow speed accelerates, the passage of the wings through the air causes a roll-up of the air mass at the tip of each wing. The air mass continues to swirl much in the same manner as a tornado, except that its position in the air is horizontal. The force of the resulting tornados is proportional to the weight, wing span and speed of the aircraft . . . . The size, weight and acceleration of a Boeing 707 is such as to create a violent disturbance in the air." *Lightenburger v. United States*, 298 F. Supp. 813, at 822-23 (1969).

The Court also found that Gordon was a qualified pilot with no physical ailments; the Cessna was mechanically sound; the PAR Controller did not warn Gordon of possible turbulence left by the missed approach of the American Airlines Boeing 707; the PAR Controller did not inform Gordon that he was passing the middle marker and continued his advisories even though he had told Gordon that advisories would terminate at the middle marker; the PAR Controller did not use Federal Aviation Agency (FAA) prescribed wording in his last advisory; and the sudden left turn of the Cessna just before the crash was beyond the control capacity of the aircraft.

The Court found that Gordon was free from negligence, was entitled to initiate this approach and to continue it to minimums, and that at the time of the crash Gordon was executing a standard missed approach procedure by gaining speed in level flight before climbing away from the airport.

The government denied any negligence and contended that the crash was caused either by Gordon's decision to attempt to land under the adverse weather conditions or by his failure to properly execute a missed approach. The government also contends that the wing tip vortices were an unforeseeable and intervening cause of the accident.

The Court rejected each contention of the government and found in favor of the plaintiffs on each of their four theories of liability.

(1) "The PAR Controller Was Negligent in That He Knew, or Should Have Known, That a Hazard Existed in the Form of Wing Tip Vortices From the Prior Missed Approach of the Boeing 707, and Breached His Duty to Warn the Pilot of This Hazard."

(2) "The PAR Controller Was Negligent in Failing to Give the Warning Required by the Air Traffic Control Procedures Manual, §411.7."

These two grounds for recovery, one based on ordinary negligence and the other on a violation of a safety regulation, rest upon the Court's finding that the wing tip vortices were foreseeable.

Air Traffic Control Procedures Manual (ATCPM), §411.7 reads:

> "When controllers foresee the possibility that departing or arriving aircraft might encounter rotorcraft downwash, thrust stream turbulence or wing tip vortices from preceding aircraft, cautionary information to this effect should be issued to pilots concerned.
>
> "Note.—Since the existence and effect of turbulence is unpredictable, the provision of the above

information does not constitute the placing of responsibility on controllers to anticipate in all cases the need for such information."

The Federal Aviation Agency (FAA) and the PAR Controllers working with the FAA have a duty to warn a pilot when it appears to them that the pilot may encounter a wing tip vortex. *United States v. Furumizo*, 245 F. Supp. 981 (D. Hawaii), *aff'd*, 381 F.2d 965 (9th Cir. 1967).

The Court found that the wing tip vortices created twelve minutes earlier by a Boeing 707 missed approach caused the crash. We accept this finding.

The Court also found that the PAR Controller should have foreseen the danger of the wing tip vortex persistence and the PAR Controller violated his duty by failing to warn Gordon of this danger.

We reject this finding as clearly erroneous. All of the credible evidence shows that a 12-minute persistence of hazardous turbulence from a wing tip vortex was both improbable and unforeseeable.

The Boeing and the Cessna were separated by twelve minutes. No witness testified that the PAR Controller should have foreseen the turbulence or should have given the 411.7 warnings. Edmund Burke, an FAA specialist in accident analysis, testified that of the hundreds of thousands of take-offs and landings each year, no wing tip vortex problem was experienced when aircraft were maintained at Instrument Flight Rule (IFR) minimum separations of three miles. This would be about one and one-half minutes.

Plaintiffs' own expert, Vance Breese, testified that he had never heard of a vortex persistence of more than six

and one-half minutes. He described the circumstances which caused this crash as, "a situation that doesn't happen once in a million landings."

The Court viewed an FAA instructional film, titled, "Wake Turbulence." The film warned that "wake turbulence may remain severe in excess of five minutes." James Nimmo, a pilot and technical advisor for the film, testified that this time span was the most conservative estimate possible, made to give warning to the most inexperienced pilot under the worst possible wake turbulence conditions.[6]

The Court apparently reached its finding that hazardous vortices could persist for twelve and one-half minutes by extending the conclusions in the Bleviss Report based upon the relative sizes of DC6B's and Boeing 707's. The Bleviss Report was prepared for Douglas Aircraft Company in 1954. It is a theoretical analysis of wing tip vortices, based not upon experiments, but upon mathematical and engineering approximations of vortex activity behind a DC6B.

On vortex persistence time, the Blevis Report attempts to define rules of thumb which would allow for safe operation of small aircraft. It concluded that a safe take

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[6] "I did base this [five minutes] on . . . the most absolute ideal conditions that could possibly exist. The heaviest of the heavy aircraft that we have with a pilot of the least flying experience and meteorological conditions that were most conducive to such a thing, which generally we speak of as an absolute dead calm wind. . . .

"When I say in excess of five minutes, I mean just barely in excess of five minutes.

"Q. But you mean less than six minutes?

"A. Oh yes. . . ."

off and landing separation would be less than two and one-half minutes except when there was a cross-wind component of between two and one-half and seven miles per hour.[7] In that event, the report recommends a separation of greater than five minutes but less than ten minutes. However, the report admits that no calculations were made for more than five minutes.

The intensity of a vortex increases with the weight of the aircraft. A Boeing 707 weighs 100,000 pounds more than a DC6B; government witness Zalovcik estimated that a 707 would generate a vortex about 25 per cent more intense than would a DC6B. The Court assumed that a vortex from a 707, being 25 per cent more intense than one from a DC6B, would also take 25 per cent more time to decay to a non-hazardous level. The Court therefore reasoned that the Bleviss rule of thumb for vortex persistence behind a DC6B, which the Court assumed was 10 minutes, increased 25 per cent to twelve and one-half minutes for a Boeing 707.

The Court sought support for its conclusions and asked Zalovcik to assume the validity of a 10-minute rule of thumb and a 25 per cent increase in vortex persistence for a Boeing 707. On these assumptions, Zalovcik admitted the correctness of the twelve and one-half minute calculation, but he denied the validity of the assumptions, the simplistic method of arriving at this figure, and the possibility of any hazardous vortex persisting for twelve and one-half minutes no matter how generated.

Zalovcik also testified that the Bleviss Report was made without experiments and that the conclusions were

[7] It is not clear whether there was such a cross wind at the time of the crash.

based on theoretical computations which did not consider "ground effect"–a critical factor in vortex persistence. In addition, the Bleviss Report was internally inconsistent. The report stated that, after five minutes, decay increased the core radius less than one foot, but Figure 12, attached to the report, showed an increase in core radius from seven to fifty feet within five minutes. Zalovcik also testified that after seven minutes, the turbulence rate, even on a mathematical basis, was so low that it did not create a hazard, could not be distinguished from a mere gust of wind, "and would have an imperceptible effect on the Cessna."

His conclusion was supported by other scientific evidence and expert testimony.

The Kraft Report, published in 1955 by the National Advisory Committee for Aeronautics, was an experimental analysis of wing tip vortices. The author measured persistence for only 60 seconds and concluded that vortices do not appreciably lose strength for 35 seconds, after which they begin to deteriorate.

The Air Traffic Service Bulletin on wing tip vortices, published for Air Traffic Controllers by the FAA, three weeks before the crash warned that "[m]uch remains to be learned about the characteristics and behavior of vortices"; they can "last for several minutes in calm air"; and the "path of turbulence behind a heavy aircraft can extend for a distance of three to seven miles." At take off and landing speeds, this would be about one and one-half to three minutes.

The longest actual vortex measurements were made in England, and they showed no significant vortex persistence after four minutes.

The overwhelming weight of scientific reports and the testimony show that no credible date existed to enable either the PAR Controller or the FAA to predict that that wing tip vortices might persist for as long as six minutes. Even if the Court chose to rely on the unsubstantiated reports of several pilots who claim to have experienced dangerous turbulence during flight, none of them reported wing tip turbulence had persisted for more than seven and one-half minutes.

In our view, it was clearly erroneous to find that the PAR Controller was negligent when he failed to warn Gordon of the hazards of wing tip vortices from a missed approach of a Boeing 707 which occurred more than ten minutes before Gordon commenced his approach and more than twelve minutes before the crash.

The Court found liability on two other theories:

(3) "The PAR Controller Was Negligent in That He Gave a Series of Misleading, Confusing, Improper and Unduly Deferred Advisories to the Pilot."

(4) "The PAR Controller Was Negligent in Failing to Give the Instruction Required by the Air Traffic Control Procedures Manual, §§344.9 and 394.7."

During the approach, the PAR Controller advised Gordon that the radar approach would be terminated at the Middle Marker, which was one-half mile from touchdown, at an altitude of 210 feet. Instead, the PAR Controller waited for 35 to 45 seconds to inform Gordon that he had passed the Middle Marker. At that time Gordon was 25 feet below the pre-selected minimum safety altitude.

Section 344.9 of the Air Traffic Control Procedures Manual states:

"344.9 If an aircraft exceeds the lower and/or lateral limits of the prescribed safety zone to a point where, in the judgment of the controller, safety of flight is likely to be affected, the pilot shall be instructed to climb to a specified altitude and fly a specific course, as appropriate."

The purpose of this directive is to prevent a low-flying plane from encountering "ground clutter problems."

The prescribed instruction for such low-flying aircraft is set forth in Section 394.7 of the Manual:

"394.7 To instruct a pilot to discontinue approach when the aircraft exceeds safety limits: IF RUNWAY IS NOT IN SIGHT, CLIMB IMMEDIATELY TO (altitude), TURN LEFT/RIGHT, HEADING (degrees), (reason and further clearance, if appropriate), ACKNOWLEDGE."

There are two proper ways to execute a missed approach. One is by an immediate climb, and the other is by making a more gradual ascent by gaining speed prior to climbing. Absent an emergency, either one is acceptable, but in an emergency the safer method is to climb immediately. Instead of using the language of the manual, the PAR Controller said:

"Going twenty five feet below the glide path adjust descent take over and complete your landing visually on runway to five left is you're not ah contact execute a missed approach climb westbound to VFR conditions on top."

The Court held that the PAR Controller was required to use the uniform terminology in Section 394.7 and his failure under the circumstances to use this terminology

not only violated the provisions of the regulation, but was also negligence.

"The phraseology selected by the PAR Controller may well have induced confusion and disorientation in the pilot, exposing him . . . to all reasonably foreseeable hazards, including the disorientation of the pilot and other forces such as the effects of wing tip vortices." *Lightenburger v. United States, supra,* at 835.

Even if we assume that it was negligence not to have issued the warning with the precise terminology of the regulation, there was no causal connection between such negligence and the crash.

The Court found that the crash was the result of severe turbulence caused by the wing tip vortices of the Boeing 707. We have already held that this danger was not reasonably foreseeable.

Although the Court speculated that the failure to use the uniform phraseology "might induce confusion and disorientation" (P. 835), or "possibly . . . disorientation" (P. 839), there was no finding that Gordon became disoriented, and such a finding would have been inconsistent with the Court's other finding:

"The evidence excludes any failure on the part of the pilot or the aircraft. The final violent maneuver was beyond the controlled capacity of the aircraft. The Court necessarily finds that it occurred as the result of turbulence from wing vip vortices, the only outside force acting upon the aircraft." *Lightenburger v. United States, supra,* at 839.

The finding that the United States was liable on either of these two theories was clearly erroneous.

We need not consider the validity of appellant's other contentions.

These cases are reversed and remanded to the District Court with instructions to enter judgments in favor of the United States.

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GERALDINE L. LIGHTENBURGER, et al.,
Appellees,
v. No. 24854
UNITED STATES OF AMERICA,
Appellant.

IVORY COMBS and NORTH AMERICAN AVIATION, INC.,
Appellees,
v. No. 24855
UNITED STATES OF AMERICA,
Appellant.

JOAN GORDON, et al., and EDITH CARRINGTON,
Appellees,
v. No. 24856
UNITED STATES OF AMERICA,
Appellant.

EAGLE STAR INSURANCE CO.,
Appellee,
v. No. 24857
UNITED STATES OF AMERICA,
Appellant.

JUDGMENT

Appeal from the United States District Court
for the Central District of California

This cause came on to be heard on the transcript of the record from the United States District Court for the Central District of California and was duly submitted. On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said District Court in this cause be and hereby is reversed and remanded with instructions.

Filed and entered—April 27, 1972.

APPENDIX C

[ORDER DENYING REHEARING]

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GERALDINE L. LIGHTENBURGER, et al.,
Appellees,
v.
UNITED STATES OF AMERICA,
Appellant.
No. 24854

IVORY COMBS and NORTH AMERICAN AVIATION, INC.,
Appellees,
v.
UNITED STATES OF AMERICA,
Appellant.
No. 24855

JOAN GORDON, et al., and EDITH CARRINGTON,
Appellees,
v.
UNITED STATES OF AMERICA,
Appellant.
No. 24856

EAGLE STAR INSURANCE CO.,
Appellee,
v.
UNITED STATES OF AMERICA,
Appellant.
No. 24857

Appeal from the United States District Court for the Central District of California

ORDER

Before: MERRILL and HUFSTEDLER, Circuit Judges, SOLOMON, District Judge.*

IT IS ORDERED that the opinion dated April 27, 1972, be amended by deleting the sentence beginning on line 29, Page 11[*], of the opinion, which reads:

> "The purpose of this directive is to prevent a low-flying plane from encountering 'ground clutter problems.'"

and inserting in lieu thereof;

> "The purpose of this directive is to prevent low-flying planes from colliding with buildings or other fixed objects on the ground."

The petitions for rehearing are denied.

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*Honorable Gus J. Solomon, United States District Judge for the District of Oregon, sitting by designation.

[*See App. A, at 132]

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GERALDINE L. LIGHTENBURGER, et al.,
Appellees,
v.
UNITED STATES OF AMERICA,
Appellant.
No. 24854

IVORY COMBS and NORTH AMERICAN AVIATION, INC.,
Appellees,
v.
UNITED STATES OF AMERICA,
Appellant.
No. 24855

JOAN GORDON, et al., and EDITH CARRINGTON,
Appellees,
v.
UNITED STATES OF AMERICA,
Appellant.
No. 24856

EAGLE STAR INSURANCE CO.,
Appellee,
v.
UNITED STATES OF AMERICA,
Appellant.
No. 24857

ORDER STAYING ISSUANCE OF MANDATE

(August 4, 1972)

Upon application of Karl Seuthe, counsel for the Appellees, and good cause appearing, IT IS ORDERED that the issuance, under Rule 41(a) of the Federal Rules of Appellate Procedure, of the certified copy of the judgment of this Court in the above cause be and hereby is stayed pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for writ of certiorari to be made by the Appellees herein, provided such petition is filed in the Clerk's Office of the Supreme Court of the United States on or before August 24, 1972.

In the event the petition for writ of certiorari is granted, then this stay is to continue pending the final disposition of the case by the Supreme Court of the United States.

/s/ Gus J. Solomon
United States District Judge

Dated: San Francisco, Calif.
August 4, 1972

APPENDIX E

[OPINION OF THE DISTRICT COURT]

GERALDINE L. LIGHTENBURGER, et al.,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

IVORY COMBS and NORTH AMERICAN AVIATION, INC.,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

JOAN CORDON, et al., and EDITH CARRINGTON,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant

EAGLE STAR INSURANCE CO.,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

Civ. Nos. 64-1672, 64-1684, 64-1687 and 64-1692

OPINION OF THE DISTRICT COURT

MEMORANDUM OPINION AND ORDER FOR JUDGMENT FOR PLAINTIFFS

HAUK, District Judge.

These are four consolidated actions against the United States Government for damages for wrongful deaths,

personal injuries and property damage arising out of the crash of a Cessna 310-G airplane at Los Angeles International Airport on December 6, 1962.

The pilot, James Gordon, and two passengers, Dale D. Lightenburger and Bervial Carrington, were killed in the crash. North American Aviation, Inc. facilities were damaged when the plane crashed into it. Ivory Combs, an employee of North American Aviation, Inc. who was working on the ground, sustained personal injuries. Eagle Star Insurance Company is the subrogee for hull damage to the aircraft. North American Aviation, Inc. is the subrogee for workmen's compensation paid to Ivory Combs.

The actions were consolidated, and separate trials on the issue of liability and damages were ordered by the Court on the motion of the Plaintiffs after a hearing held on August 20, 1965.

All actions charge negligence of Defendant United States of America by and through its agents acting within the scope of their agency and employment. Jurisdiction in this Court exists under 28 United States Code §1346(b), the pertinent provision of the Federal Tort Claims Act.

Plaintiffs alleged and offered evidence upon four theories of liability. Two theories were based on ordinary negligence, and two theories were based upon liability stemming from breach of safety regulations. The Government denied negligence and violation of the safety regulations, as well as the nature and extent of the Plaintiffs' damages; and asserted the affirmative defense of contributory negligence as to the pilot Gordon.

The case was tried on October 10, 11, 13, 19, 20, 25, 26, and 27, 1967; November 7, 8, 9, 15, 16, 17, 21, and 22, 1967; December 19, 20, 21, 1967; January 23, 24, 25, 26, 1968; and February 8, and 9, 1968. The Court.

after hearing all of the testimony and the arguments of counsel and being fully advised in the premises makes its decision, findings of fact, and conclusions of law in favor of all the Plaintiffs and against the United States of America with judgment ordered for the Plaintiffs and against the Government.

This action arises out of the crash of a Cessna 310-G aircraft at Los Angeles International Airport at approximately 4:10 P.M. on the afternoon of December 6, 1962.

The flight originated in Las Vegas, Nevada under an instrument flight plan giving Los Angeles International Airport as destination.

When the pilot reached the Los Angeles area, he first requested a clearance for an instrument approach to Los Angeles International Airport, but prior to beginning the approach he requested and obtained clearance to go to Santa Monica Airport. The pilot later discovered that Santa Monica Airport was closed because of weather conditions and the pilot again requested instrument approach to Los Angeles International Airport. The pilot was then brought in contact with the instrument landing system at a point 6.4 miles from the end of Runway 25 Left designated as the Outer Marker.

The pilot requested a Precision Radar Approach (PAR) and was placed under the jurisdiction and direction of the PAR Controller, an employee of the Federal Aviation Agency (FAA).

The pilot was advised by the PAR Controller that the approach would be terminated at the Middle Marker, a point which is one-half mile from the end of the runway. The PAR Controller then proceeded to advise the pilot of his position with respect to the glideslope both vertically and horizontally as the approach was being made.

The conduct of the approach is directed and controlled by the PAR Controller and the pilot responds to and relies on advisories given by the Controller as to the movements of the aircraft.

The PAR Controller did not terminate the approach at the Middle Marker as he had advised the pilot would be done, but rather, continued the approach past the Middle Marker up to a point between the Middle Marker and the end of the runway and instructed the pilot to, "take over and complete your landing visually on Runway 25 Left and if you're not contact execute a missed approach climb west bound to VFR on top."

The Air Surface Radar Detection (ASDE) picked up the Cessna at this point. The Cessna was observed on the ASDE to fly directly above Runway 25 Left for a distance of approximately 3000 feet. The aircraft then made a sudden and violent left veer, making a 210 degree turn with a turn radius of approximately 500 feet and then crashed in the aircraft parking area of the Autonetics Division, North American Aviation Company. There were no survivors from the crash which caused extensive damage to North American facilities and a resulting fire, which severely injured Plaintiff Ivory Combs.

The pilot James Gordon was a businessman in Las Vegas with a total of 668 hours as a pilot in command; he held appropriate licenses from the FAA and was an above average pilot.[1] The pilot had no tendencies towards dizzi-

[1] The pilot, James L. Gordon, was a businessman in Las Vegas, Nevada, was married and resided with his family in that city. The Federal Aviation Agency records reveal that he had logged a total of 668 hours as pilot in command; that he held pilot ratings as follows: Airplane Multiengine, Single Engine Land, and Instrument; that, of the total pilot time, 561 hours were accomplished in Cessna 310 aircraft, 182 hours were actual and simulated instru-

ness, vertigo or any other physical disability which would affect his flying ability. An autopsy revealed no physical ailment which would contribute to or account for the crash.

The aircraft was a new twin-engine 310-G Cessna, well equipped with navigational equipment. There was no evidence of any equipment failure with the exception of some difficulty with an automatic direction finder which is not relevant to the crash.

The Government conceded that there was no evidence of any lack of maintenance or mechanical failure which could have caused or contributed to the crash.

On the afternoon of the crash during the weather period prior to 4:00 P.M., the airport was experiencing weather which necessitated instrument approaches, but which permitted landings to be made after penetration of the general haze and clouds at a point near the runway.[2]

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ment time of which 43 hours were accumulated in the 90 days preceding the crash. The pilot received his instrument pilot's license on September 22, 1962, following his ground and flight examination by Mr. J. Clair Whitely of Ogden, Utah, who was designated by the Federal Aviation Agency to conduct such tests. Mr. Whitely appeared as a witness in these proceedings and affirmed the contents of his letter of December 21, 1962, written to and at the request of the FAA following the crash in which he recited his observation that the pilot was above average in his judgment, technique and attitude over the course of the examination which consisted of ¾ hour oral examination and three hours of flying. (RT 4244).

[2]The source of information as to the weather conditions at or near Los Angeles International Airport is both the weather reported by the weather observers and relayed by the tower controllers, and the weather reported by pilots of other aircraft. The weather bureau observations indicating conditions at the airport itself were taken by a weather observer from a second story level at approximately one-half mile northerly of the east end of Runway 25 Left and were supplemented by a mechanical device

At about 4:00 P.M. a low-lying fog bank began rolling in

near the runway itself, called a transmissometer, which measures obscuration values between two points parallel with the runway electronically. This latter device records, and indicates both in the weather bureau and in the instrument control room of the tower, the simulated distance that is visible down the runway for an approaching aircraft, which distance is termed Runway Visual Range (RVR). In the present instance, the reported weather was given to the pilot from time to time prior to his initiating his approach and the weather values were such as to indicate that an approach for possible landing would have to be made on instruments, i.e. by reference to instrumentation within the cockpit of the aircraft as distinguished from visual reference to outside objects.

On the afternoon in question during the period prior to 4:00 P.M. the airport was experiencing weather which necessitated instrument approaches but which permitted landings to be made after penetration of the general haze and clouds at a point near the runway. However, at about that hour a low-lying fog bank began rolling in across the airport. The nature and location of the fog was described by pilots of other aircraft in the vicinity. Stewart W. McGahan was Captain of a Western Airlines flight in a DC-6B aircraft who testified that he first taxied to Runway 24, a shorter east-west runway on the north side of the airport, but the fog moved in and he then taxied his aircraft to the east, or approach end, of Runway 25 Left at about 4:00 to 4:05 P.M. when the RVR was still below his take off limitations, and held his position awaiting weather improvement since there was enough fluctuation in the forward visibility so that he felt he was warranted in waiting for possible take off. While holding at the end of the runway, the First Officer of the Western flight engaged in a colloquy with a pilot of a TWA Constellation which was similarly holding for take off on his right, some 150 feet away, to the effect that the weather looked "a little rough"–"getting thicker"–which was picked up on the tape recorder of the Los Angeles Tower facility. Captain McGahan stated that at times he could see about one-quarter mile, but forward visibility never achieved a value of 2400 RVR, his required minimums to attempt take off.

across the airport as an American Airlines Boeing 707 approached Runway 25 Left. The fog appeared to the co-pilot as a low ground fog, 20 to 30 feet in height.[3] The American Airlines flight executed a missed approach over the field. Approximately ten to eleven minutes later, Gordon made his PAR approach. A PAR approach is conducted by advisories received by the pilot from a radar operator.[4]

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[3] John A. Templeton and Milton Nielson were the Captain and First Officer respectively of American Airlines Flight 101 (a Boeing 707 having a gross weight of approximately 170,000 pounds) which made an instrument approach to Runway 25 Left at about 4:00 P.M. on December 6, 1962, and, upon reaching an altitude very close to 200 feet, were able to see the approach lights, but having insufficient forward visibility to make a landing, executed a missed approach directly over Runway 25 Left. First Officer Nielson reported his observation of the fog over the runway as: "A low fog on the ground"–"the fog appeared to be 20 to 30 feet or less"–"the fog appeared to be just on the ground obscuring the runway". This aircraft was not in the fog but was above it and the fog appeared to be generally level. Captain Templeton, who had been monitoring his instruments on the approach, looked up from them to see the threshold lights and made the decision for the missed approach and did not contradict his First Officer's evaluation and description of the nature of the fog condition over the runway.

[4] When the general weather in the vicinity of an airport such as Los Angeles International becomes adverse, approaches are commonly made by reference to instruments in the aircraft combined with or supplemented by advisories from the radar controller in the tower. The basis for such approaches is the Instrument Land System (ILS) installed and maintained by the FAA upon the airport wherein a radio beam, emanating from a point on the ground at the touchdown point on the runway, travels up and out along the approach course to the runway at a constant angle of three degrees. The ILS beam or glideslope is utilized in two ways: first, by using radio navigation instrumentation in the aircraft, the pilot can determine at any particular time his relative

It was conceded by the Government that the approach conducted by the pilot was proper and well executed, and that no negligence on the part of the pilot existed during the approach of the aircraft down to the Middle Marker which exists a half mile from the end of the runway and at an altitude of 210 feet along the glideslope; and the Court finds no negligence.[5] But the PAR Con-

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position to the glideslope vertically and horizontally; second, the tower radar operator, by observing the radar return on the radarscope upon which the line of the glideslope is etched, can determine the relative position of the aircraft to the glideslope as well as its distance from the point of touchdown.

A full radar approach or precision radar approach such as was being utilized in the instant case is one where the primary reliance for information as to the position of the aircraft is placed upon the radar controller and in which the pilot flies the plane without visual reference, relying upon his flight instruments in his maintenance of the proper *attitude* of the plane and relying upon and following the directions of the controller in his maintenance of the proper *course* of the plane down the glideslope to a point where visual reference to the runway can be had, where he "takes over visually" and completes a landing.

[5]Under such conditions, the FAA has by regulation set up certain minimum conditions under which a pilot may proceed with attempting a landing after making the approach. These minimums for this runway at Los Angeles were set at "200 and one-half", i.e. upon reaching an altitude of 200 feet, the pilot must then have one-half mile of forward visibility in order to proceed with a landing. An exception to the altitude portion is made under certain conditions by 14 Code of Federal Regulations (C.F.R.) Section 609.4(g), in effect on December 6, 1962, wherein it is provided that the pilot may descend an additional fifty feet if he is clear of clouds but may not descend lower than that unless he has reached a point from which a normal approach can be made to the runway, and either the approach threshold of the runway or the approach lights or other markings identifiable with the runway are clearly visible:

"No aircraft, after reaching an altitude equal to the minimum altitude for landings specified in these regulations, will descend below such altitude unless it is clear of clouds and

troller because of information available to him through the Local Controller knew, or should have known, that

> thereafter, except when landing minimums equal to or higher than 1000-2 are authorized, the aircraft will not descend more than 50 feet below such altitude unless (1) it has arrived at a position from which normal approach can be made to the runway of intended landing, and (2) either the approach threshold of such runway or the approach lights or other marking identifiable with such runway are clearly visible to the pilot."

See also Exhibit 1 referred to by Witness Burke:

> "Descent below 362 MSL (200') shall not be made unless visual contact with the approach lights has been established or the aircraft is clear of clouds."

The Regulations further provide that:

> "If, at any time, after descent below the clouds, the pilot cannot maintain visual reference to the ground or lights he will immediately execute the appropriate missed approach procedure prescribed in the regulations in this part."

This may very well have been the factual situation here at least in the opinion of an experienced pilot, witness David Irvine, who stated in answer to a question on cross-examination:

> "A I think from which I have heard in the extensive time I spent here in the courtroom that he very likely was clear of clouds down through probably down to his minimums.
> "Q You assumed, then, that he was free of clouds at 200 feet and was entitled to go down for an additional 50 feet?
>
> "A I would assume so." (RT 4367)

Having reached the minimum altitude and not being in contact with the runway, it them becomes the duty of the pilot to execute a missed approach. 14 C.F.R. 609.15(a), effective December 6, 1962:

> "A missed approach will be initiated at the point where the aircraft has descended to authorized landing minimums at a specified distance from the facility if visual contact is not established, or if the landing had not been accomplished,or when directed by Air Traffic Control."

There is no clear evidence that the pilot violated a regulation by going below minimums since, if he did not go into clouds or fog, his altitude, as such, whether it was 50 feet or some other value less than 200 feet, would make no difference. Testimony of Defendant's witness, Mervyn A. Davenport:

the fog was becoming thicker at the approach end of

"The Court: And you do not know how high the fog was at the time this missed approach was made or the time Gordon came in?

"A No sir, I did not know the exact amount. I knew the type of fog and the type of condition that existed, but not the exact height of the fog.

"Q And you have not heard the deposition of Captain Milton Nielson of American Airlines, have you?

"A No, Sir.

"Q To the effect that the fog would have been about 60 or 70 feet high and level?"

(Actually, Captain Nielson testified 20 or 30 feet (RT 414)):

"A Is it possible?

"Q If it was that high and only that high and level and the pilot stayed above it, he never did go below his minimums, did he?

"A No, Sir.

"Q If he never went into the clouds?

"A No, Sir." (RT 2657-2658)

The approach made by the pilot in this instance was within the safety limits with respect to the glideslope presentation. Testimony of witness Gerald Feltman:

"Q One other statement, I think this was said several times in the deposition, Mr. Feltman, when you were asked about this approach made by the pilot, and did you not state that he was within safety limits at all times?

"A Yes, I did.

"Q That was stated on several occasions, and you do not back off from that now, do you?

"A No. (RT 3140)

And the approach was skillfully executed. Testimony of witness Vance Breese:

"Q And from the corrections that you heard given to the pilot on this particular approach, and the approach in general, have you formed an opinion with respect to the quality of that approach?

"A Yes, Sir.

Runway 25 Left, making this thickening fog condition

"Q And what is that opinion?

"A That it was either an unusually skillful approach for the businessman pilot or it was an automatic approach controlled by the automatic pilot and the approach coupler.

"Q Now there were certain corrections given of 25 feet, 15 feet, I think even as far as 100 feet. Do those corrections denote to you as an experienced pilot any lack of ability of the party of the pilot who was flying the plane?

"A On the contrary, they showed an unusual amount of skill." (RT 497)

And defense experts agree it was successfully completed. Direct examination of John McCormick:

"Q Have you an opinion as to whether reconstructing–have you an opinion as to whether or not that approach, the PAR approach, as it is known to you as a pilot, and based on your experience as to what you would expect of a pilot running PAR approaches, as to whether or not it was successfully completed?

"A It was successfully completed.

"Q I will ask your opinion as to whether or not the PAR approach, that is, at that phase of this case in the sequence of the events, had anything to do with the actual crash?

"A In my opinion it did not." (RT 3833-3834)

* * * * *

"The Court: If I understand you correctly, you feel up to the middle marker he was prudent; is that your answer?

"The Witness: That's correct. I wouldn't argue with it." (RT 3857)

At a point on this approach approximately three miles from touchdown the controller transmitted the latest weather advisory to the pilot which indicated that the ceiling was zero and that the visibility was zero with fog and asked if the approach would be continued, and the pilot replied, "Put me right down on the runway." Expert pilot witnesses in the trial of the case have agreed to the propriety of the continuation of the approach. Testimony of witness Elwin D. Sullens, by Government counsel on cross-examination:

"Q As a matter of fact, and I am addressing this to you as a prudent pilot, if three miles from touchdown you received a

reasonably foreseeable with the result that his failure to advise the pilot thereof was negligence.[6] The PAR Con-

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latest weather report of ceiling zero, sky obscured, visibility zero with fog, wouldn't you discontinue your approach at that point if you had an alternate airport that was clear to land, like Burbank?

"The Witness: I would probably go to my minimums.

"Q You would go down to your minimums?

"A Yes.

"Q And then you would go down to your minimums for a look see to see what you had?

"A Right." (RT 314)

Direct examination of John McCormick, Air Carrier Operations Inspector for FAA:

"Q Mr. McCormick, does the term "look-see" privilege in terms of the pilot's sight, given zero zero weather with fog, RVR less than 1000, at a point before he reaches the middle marker, does that have any meaning to you?

"A Yes, this was privilege, if you will, given to enable a pilot because of some inaccuracies in our visibility reporting system, as far as actually what is occurring on the runway, to fly an approach to his minimums, even though the weather was reported below minimums, to take a look at the situation." (RT 3811, 3812)

And Government counsel has frankly admitted to the Court during the course of the trial that there was no claimed fault or negligence of the pilot in making and continuing this approach:

"The Court: I don't think the Government contends he was wrong in coming down to the point of going off the blip.

"Mr. Fareed: He had the right to take a look-see. He had the right to come down and see if he had his minimums. To that point, he had that right. Beyond that point I think the Government's evidence will show—and it is our position—that the conduct of his flight was negligent." (RT 877)

* * * * *

"Mr. Fareed: We say the pilot's negligence and error occurred at the point of the last PAR transmission. 'Take over and complete your landing visually.' That is the point at which we way it starts. Our evidence will be consistent with that position, I think." (RT 879)

[6]RT Vol. 2, pp. 5-7; 1134-1140.

troller admitted that the two conditions necessary to bringing into operation Regulation 344.9 of the Air Traffic Control Procedures Manual (Clerk's Transcript, hereinafter referred to as "CT", Exhibit 17) were present:

1. Plane below safety limits; and
2. Controller's judgment that safety of the flight was likely to be in danger.

The directive requires the PAR Controller to use the following express terminology of Section 394.7 set forth in the Air Traffic Control Procedures Manual:

> "To instruct a pilot to discontinue approach when the aircraft exceeds safety limits: IF RUNWAY NOT IN SIGHT, CLIMB IMMEDIATELY TO (altitude), TURN LEFT/RIGHT, HEADING (degrees), (Reason and further clearance, if appropriate), ACKNOWLEDGE."

Nevertheless, in violation of this directive, the PAR Controller gave the following advisory (Plaintiffs' Exhibit 4A, p. 9):

> "[T]ake over and complete your landing visually on runway two five left if you're not ah contact execute a missed approach climb westbound to VFR conditions on top."

The pilot was thereby advised to take over visually, complete his landing, and if the runway was not in sight, to execute a missed approach.

The pilot then apparently began to execute a missed approach and add full power, proceeding down the runway for 3000 feet, at which time the aircraft performed an extremely violent maneuver in a left bank with a turn radius of 500 feet, executed a turn of 210°, and crashed in a steep left bank, nose down. The final maneuver

involved a turn so tight as to be beyond the control capacity of the aircraft.[7]

[7]The final maneuver of the aircraft was one in which it left the course over Runway 25 Left and made a steep left turn which ended in its being observed by the witness, Elwin Sullens, coming down into the Autonetic's parking lot in a 60 to 70 degree left bank and nose down at about 45 degrees (RT 287) on a heading close to 70 degrees. (RT 285) The point at which the crash occurred is approximately 1000 feet south of Runway 25 Left (see Exhibit 8A). In order to reach the point of crash and the heading at the time of crash, the aircraft would necessarily have proscribed a turn of approximately 210°.

Witness Vance Breese, whose background and experience in the field of aviation are almost legendary, having commenced his flying in 1916 and thereafter pursuing a career in aviation that encompassed flying the air mail in the 1920's, the design and manufacture of the several types of airplanes, participation in early airlines, and engineering and test flying for the major aircraft manufacturers in the United States, testified:

"Q Now, Mr. Breese, from your experience and knowledge of flying and in your knowledge of the Cessna 310-G and its capabilities, do you have an opinion with respect to this turn that was made as to whether or not it exceeded the aircraft capability under normal pilot control?

"A Yes, I have an opinion.

"Q What is your opinion in that regard?

"A That the airplane could not under normal manipulation of the controls by a pilot of normal experience make such a turn.

"Q Now, do you have--what are your reasons for that, sir?

"A The airplane turned very sharply, very abruptly. The rate of turn apparently increased very rapidly, because the airplane made a total turn of about 210 degrees in a distance that would have imposed structural loads on the airplane to a point at least of discomfort to the passengers, and it could have been an exceedingly dangerous maneuver even in clear weather.

"Q In your opinion was this a pilot controlled maneuver?

"A No, sir, not at all." (RT 536-537)

The witness went on to relate his opinion as to the cause of the violent and abnormal maneuver of the aircraft:

There exists a phenomenon known as wing tip vortices. When a heavy aircraft flying at slow speed accelerates, the

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"A Yes, I have an opinion which, based upon the fact we were unable to determine any cause, either mechanical or human in the action of this airplane, that the rapid roll and the crash could only have been caused by an external agent and I know of no external agent except the tip vortices generated by the preceding airplane's missed approach." (RT 543)

Plaintiff witness Gerald Mills, whose qualifications include degrees in aeronautical engineering and mechanical engineering from California Institute of Technology and pilot experience since 1932, including experience in Flight Research Branch at Wright Field, Dayton, Ohio, also expressed an opinion on the subject:

"Q Mr. Mills, there has been testimony in this court that on the date in question the Cessna 310-G flew a distance of 3000 feet straight in a generally westerly direction along 25L Los Angeles International and then suddenly began to make what would be a left hand turn and did accomplish a 210 degree turn within a diameter of approximately 1000 feet. Now, I ask you whether this particular maneuver with this particular aircraft could have been induced by normal pilot handling?

"A This is not a maneuver you would normally do. You would normally—if you tried it you would pull the wings off the airplane.

"Q So it is your testimony, then, that this is an abnormal maneuver of this aircraft?

"A Yes." (RT 4164)

And later went on to explain his opinion as to the cause of the maneuver:

"A It was caused by something other than the pilot, some meteorological phenomenon other than the pilot.

* * * * *

"Q What is your opinion as to the cause of this crash?

"A I believe that airplane was tipped up on its wing by going through the path of the vortices and it went in because of that.

"The Court: When you say it went in, do you mean crashed?

"The Witness: Yes, Sir." (RT 4173)

passage of the wings through the air causes a roll-up of the air mass at the tip of each wing. The air mass continues to swirl much in the same manner as a tornado, except that its position in the air is horizontal. The force of the resulting tornados is proportional to the weight, wing span and speed of the aircraft. The advent of heavy aircraft in the field of aviation has caused increased recog-

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Plaintiff's last witness in the case, David Irvine, whose qualifications as a pilot expert witness have been reviewed above, also rendered an opinion with respect to the maneuver:

"Q You have heard the testimony in evidence with respect to the diameter of that turn?

"A Yes, sir.

"Q With your familiarity with the Cessna 310 and your knowledge of the flying characteristics of that airplane, do you feel that it is physically, within the cockpit, such a turn as would be done accidentally?

"A No, I do not.

"Q Do you feel that it is the kind of a turn that could be done unintentionally?

"A No, sir, I do not.

"Q Do you have an opinion as a pilot as to whether or not it is the type of a turn which would be made by a pilot who was duly qualified to fly instruments?

"A No, it certainly would not be.

"Q Do you have any opinion as to whether or not this is acutally within the physical capabilities of the aircraft?

"A It is not within the maneuvering capabilities of the airplane, no.

"Q Do you have an opinion with respect to the possibility of this maneuver that has been described being in controlled flight by the pilot?

"A It could not have been, in my estimation, in controlled flight." (RT 4345)

nition of this phenomenon. The size, weight and acceleration of a Boeing 707 is such as to create a violent disturbance in the air. The duration of this phenomenon is regulated by several factors, the most important of which is the type of wind condition extant. A relatively slight wind condition facilitates the preservation and endurance of wing tip vortices over the runway. The ideal conditions for the preservation of violent vortices were present at the hour of the crash. It was the opinion of two experts that the immediate forces acting upon the violent final maneuver of the Cessna were the violent wing tip vortices shed by the American Airlines Boeing 707 which had executed a missed approach previously. The Court agrees with these opinions and finds that the effects of wing tip vortices provide the most reasonable explanation for the violent final left bank maneuver.

The advent of the modern heavy transport type aircraft has brought with it a phenomenon which was unknown to the early decades of the aviation industry. General knowledge of the subject is so limited that, even during the course of this trial, a Government pilot witness, John McCormick, with flying experience of 25 years in which he accumulated 13,000 hours flying time, equated it in severity as something less than "propwash" occurring behind a propeller driven aircraft. (Reporter's Transcript [hereinafter referred to as "RT"] 3712).

However, the nature of vortices created by the roll-up of the air mass at the tip of each wing on a heavy transport aircraft operating at low speed, maximum lift situations in landing, takeoff, and missed approach configurations around the airports and the consequent hazard to light weight private aircraft, have been the subject of knowledge and study by the FAA for a number of years.

E.g., see the legislative history of the "caution turbulence" warning requirements of the Air Traffic Control Procedures Manual set forth in Furumizo v. United States, 245 F. Supp. 981, 1002-1011 (D. Hawaii 1965).

With the possible exception of Mr. McCormick, there was uniform recognition among the witnesses in this trial that the phenomenon exists:

Plaintiff witness,
Vance Breese (RT 538);
Defense witness,
Edmund Burke (RT 988);
Defense witness,
James Nimmo (RT 1193);
Defense witness,
A. Bill Bush (RT 168);
Defense witness,
Merle Nichols (RT 2070);
Defense witness,
Gerald Feltman (RT 3344);
Defense witness,
Edgar Zwiebach (RT 2273);
Plaintiff witness,
Anthony LeVier (RT 4141);
Plaintiff witness,
Gerald Mills (RT 4165).

Certain qualities of the turbulence created by wing tip vortices appear to be accepted with little or no question or controversy:

(a) *That the resulting forces can exceed the load factors and control capabilities of light aircraft.*

Testimony of witness Breese:

"Q Can this roll or the forces that are exerted exceed the normal load factors of a light aircraft?

"A Yes, this was depicted in the picture.
"Q Can they exceed the controllability of the pilot of a light aircraft?
"A Yes, it can exceed the controllability of the airplane itself, regardless of what the pilot does."

NASA Technical Note D-829 (Exhibit 48), p. 1:

"The results indicate that light airplanes traversing the wakes of currently operational heavy transport airplanes can experience loading conditions that exceed the design limit and, in some cases, the design ultimate load factors."

Exhibit J of Defendant, p. 23 (Script for FAA turbulence film):

"The air in the outside layer can rotate at speeds greater than thirty-five miles an hour. That's enough to put a light aircraft completely out of control—or even cause structural failure."

NASA expert, John A. Zalovcik (RT 2211):

"The Witness: If an airplane gets in the core, especially if the age of the vortex is low, it could rotate, yes, sir."

ATS Bulletin dated 11-15-62, published by FAA:

"Light aircraft crossing the wake of a heavy aircraft at any altitude can be structurally damaged."

(b) *That the weight factor of the generating aircraft has a direct bearing upon the strength of the vortices created.*

Defendant's Exhibit J, p. 13:

"So the heavier the aircraft, and the greater its load, the worse the turbulence will be."

Testimony of FAA employee, James W. Nimmo (RT 1195):

"Q Are you also aware that the intensity of a vortex or the so-called wing tip vortices has been said to be directly proportional to the weight and inversely proportional to the speed of an aircraft that is, in this case a 707?

"A Yes.

"Q And that the heavier and slower the aircraft the greater the intensity of the vortex in the vortex core?

"A Yes.

* * * * *

"Q You are aware of the effect of weight and speed of an aircraft in a given maneuver in terms of how it affects the intensity of the vortices created?

"A Well, yes. Yes.

"The Court: Do I understand now you say it is directly proportional to the weight and speed?

"A Directly proportional to the weight and inversely speed. In other words, the heavier the aircraft and the slower the aircraft is going the more intensity."

NASA witness, John A. Zalovcik (RT 2240):

"The Court: And these jets with their small wing span have a tendency to set out more powerful vortices than the motor driven DC-6B with a bigger wing span?

"The Witness: That is correct, yes, sir.

"The Court: Because as you said it is inversely proportional to the wing span?

"The Witness: Yes, sir.

* * * * *

"The Court: I want to know what you think. I would gather it would make some sense, that is assuming his rule of thumb is correct for a DC-6B, that the rule of thumb ought to be 12½ minutes for a 707; is that correct in your best judgment?

"The Witness: Yes."

A factual controversy arose among the witnesses in the trial which centered around the length of time that the wing tip vortices could persist as a possible hazard to a light aircraft. The factual position upon which the controversy arises is, of course, the separation time between the missed approach of the American Airlines Boeing 707 and that of the Cessna between ten and twelve minutes later together with the requirement of the Air Traffic Control Procedures Manual that a warning be given of possible turbulence. Resolution of the controversy requires analysis of the testimony of the various witnesses on the subject which might well be done in the order of their appearance at trial.

In addition to his general background in aviation, Mr. Breese related his investigation of the subject matter of vortices which included an examination of all the prominent literature on the subject, a list of which was presented to the Court and marked for identification as Exhibit 53. The witness' approach to the subject admittedly did not rely upon scientific formulae or computations but was in the nature of an empirical approach drawing upon his own background and experience and that of other flyers. Taken into consideration was a complete investigation of the facts of the instant case by an aviation accident investigator to whom the basic elements were the pilot, the machine, and their environment. The results of that investigation are evident

in this trial wherein: the pilot must be found to be qualified and in exercise of reasonable prudence; aircraft malfunction is not an issue; and the only element of the environment which would furnish a cause for the crash is the lingering vortices from the Boeing 707. From there the witness proceeds to evaluate this most prominent possibility and explore the conflict between the theory espoused by the scientists, epitomized in this case by witnesses Zalovcik and Zwiebach, and the actual experience of the pilots in the field. From there it became a problem, as it does in this case, of evaluating the rationale for the opinions of the scientists.

(c) The formula being utilized by the scientists to reach the theoretical time value had admitted limitations.

A review of the testimony and cross-examination of John A. Zalovcik in RT Vol. 13B, clearly reveals that the formula utilized by him in his calculations was "developed in the late 1800's for the free flow of gas [in] the gas mains of Europe" (RT 2189); that "one portion of the formula is a variable portion of that formula" (RT 2190); that at least one parameter, small scale velocity at any given time and place, is unknown and a theoretical value is ascribed to it (RT 2201); that the determination by the formula of the persistence of vortices is "subject to the vagaries of the atmosphere at a particular time and place" (RT 2204); and that by changing the formula, results could be obtained corresponding to reports of pilots of encountering turbulence at separation times in excess of five minutes. (RT 2246) And, similarly, examination of the testimony of Edgar L. Zwiebach, the other Government scientist witness, shows that in his work on the subject he simply utilized the same formula that had been used by Dr. Bleviss in 1954 and by the witness.

Zalovcik (RT 2287); and he likewise admitted that, by modifying the one unknown factor, he could reach results compatible with pilot reports:

"Q Well, there is one NASA report, D-1777, in evidence here as Exhibit 49. I read to you from page 7: 'It should be noted that pilots have reported apparent encounters with trailing vortices at separation times estimated at 5 minutes or more.' My question to you, sir, is whether in using the formula which you adopted and the one upon which you base your testimony today that this would be almost incredible, these reports of over 5 minutes?

"A Not incredible, but questionable.

"Q However, you could, could you not, modify the formula, that is, the one variable, to a point where they would be reasonable?

"A I believe so, yes.

"Q Similarly, you could do so with a 10-minute interval if you had a pilot report of 10 minutes?

"A Possible.

"Q Well, now, insofar as reaching the theoretical result with a modification of the formula, that isn't just a possibility, you could do that, couldn't you?

"A Yes." (RT 2294)

(d) The longest actual measurements of vortices at the point of greatest velocity, i.e., take off, landing and missed approach configurations, has been less than 2 minutes. Again, in Mr. Zalovcik's testimony, there was discussion of certain tests that had been made for periods longer than 2 minutes but these were made at high altitudes where the generating aircraft were flying straight and level and not exerting maximum lift as would be the

case in the problem area. (RT 2198) The only tests he knew of below 300 feet altitude were made by Mr. Zwiebach and in the Dynascience contract, the latter not having been completed at the time of his testimony. (RT 2199) Insofar as the Zwiebach measurements are concerned, Mr. Zwiebach himself testified that he monitored eight take offs and was able to record six of these (RT 2284), that his theoretical calculations varied as much as 50% from actual velocities measured, and that the longest time lapse measured was 65 seconds.

(e) There is admitted uncertainty as to the validity and applicability of the formula to actual conditions. At least one of the reports relied upon by Mr. Zalovcik (RT 2181, 2183), and listed as Reference No. 6 in Mr. Zwiebach's report, contains the statement that "vortices may persist for periods of 30 minutes or longer depending upon their initial strength" (Quoted from Kraft report of March, 1955 by Government counsel) (RT 2183) Witness Zalovcik, despite his apparent certainty on direct examination, appeared to believe on cross-examination that there were uncertainties (RT 2246):

"Q And similarly, if people appeared in this courtroom, actual pilots, testifying to an actual experience, where they had encountered turbulence from 2½ to 6½ minutes, on your drawing board using your formulas that would be impossible, wouldn't it?

"A I wouldn't say so, no, because as I say theoretically the vortex would exist to infinity; and, depending on the type of airplane that you had, why you would have different responses."

And witness Zwiebach appeared somewhat reluctant to mix the theoretical with the practical (RT 2289):

"A No. First of all, I would like to say that by virtue of my work I feel competent in discussing the existence or strength of vortices but not particularly competent in the field of predicting upsets of light aircraft, which is what your questions presupposes."

Both Government scientist witnesses admittedly used and relied upon the Bleviss 1954 report, and Mr. Zalovcik agreed with the following statement from page 3 of that report (RT 2205):

"Because of the many factors involved and because much of the required data would not be known in any typical situation, no detailed rules can be set up which will allow pilots of light planes to avoid difficulties under all conditions."

But he disagreed with Dr. Bleviss' statement in that report that:

"Particularly important is the fact illustrated in Fig. 12 that even after 5 minutes the effects of viscosity have increased the core radius less than one foot. Since the typical light plane has a [span] of 30 feet or more, it is clear that viscosity cannot produce any noticeable reduction in the induced effect on the light plane for any reasonable separation time." (RT 2206)

And, although Mr. Zalovcik was willing to agree with the efforts of his fellow scientist, Dr. Bleviss, to come up with a rule of thumb for use in the field (RT 2221), he was unwilling to accept the resultant figures because it did not take into account one further parameter known as "in ground" effect. (RT 2222) Yet he himself admits that the vertical and lateral movement of the vortex core is affected by its encompassing air mass; that the fact of whether it might settle toward the ground or move later-

ally at any given time is dependent upon the movement of such air mass (RT 2217); and that, again, his calculations with respect to such movements of the vortex were purely theoretical and no actual measurements have ever been made. (RT 2218)

(f) Some areas of the "scientific theory" tend to verify the practical experiences reported.

In the report of Dr. Zigmund O. Bleviss, also done under auspices of Douglas Aircraft, there is the recommendation of a 5 to 10 minute separation time under certain conditions. As pointed out above, this recommendation was made upon the basis of the generating aircraft being a DC-6B weighing 60,000 pounds. The Government witness, Zalovcik, has admitted the 25% increase in velocity of the vortex brought about by the 170,000 pound weight of the Boeing 707, which would appear logically to extend the rule of thumb separation time to 6 to 12½ minutes under similar conditions. Such a separation time would encompass the pilot reports which NASA and FAA have been receiving that upsets from turbulence are being experienced at periods beyond 5 minutes as well as the court-related experiences of Plaintiffs' witnesses, Anthony LeVier and Ronald Madley. Plaintiffs' witness, Gerald J. Mills, who testified on this subject, in addition to impressive qualification as an aeronautical engineer, is a pilot of some 25 years experience, is familiar with the evolvement of the scientific formula used by the other engineers, has performed tests with respect to the subject of persistence of vortices and yet is of the opinion that it was turbulence from the 707 vortices which tipped the Cessna upon its wing. The testimony of Mr. Mills would appear to put the "theory" of the scientific group in its proper perspective—the use

of the modified potential flow formula for determining the persistence of vortices was and is a hypothesis which has not attained evidentiary credibility sufficient to become a sustainable theory on the subject.

Thus it is that, faced with the admitted limitations on the formula being used, the paucity of actual measurements to support its results, the admitted uncertainty as to its applicability to actual conditions, and finally the division of opinion in the scientific group, one could reasonably and logically disregard the scientific hypothesis in favor of reported experiences and rules-of-thumb which bear out the reports.

The foregoing has reviewed the testimony of the major witnesses relating to the persistence of vortices. However, a number of others discussed the subject to some degree.

The Air Traffic Controller group, consisting of Edmund Burke, the specialist from FAA headquarters in Air Traffic Service, Merle H. Nichols, Assistant Chief Los Angeles Tower, and Gerald J. Feltman, the PAR Controller of the subject flight, testified pretty well along the same line. Prior to 1963, none of them, nor any of the FAA controllers, received any instruction with respect to the origin and persistence of wing tip vortices. None of them was aware of specific instances of turbulence affecting the flight of light aircraft in their experiences as controllers. With respect to giving or not giving turbulence warning to following aircraft, all of the FAA controllers followed the separation times required by the Instrument Flight Rules and the Visual Flight Rules, hereinafter referred to as "IFR" and "VFR" respectively.

The Government pilot witness group consisting of Mervyn A. Davenport of Gunnell Aviation, Cyril Tanner of Long Beach, James W. Nimmo, the script editor for

the FAA turbulence film, and John McCormick, the FAA Air Carrier Operations Inspector, were consistent in their testimony that none had personally experienced turbulence from vortices and that they did not believe vortices caused the crash of the Cessna. With the possible exception of Mr. Nimmo, none professed to have made any study of wing tip vortices, or its effect upon light following aircraft. With respect to Mr. Nimmo, he had read a number of the vortices reports but did not hold himself out to be "an expert or represent here that you have any expertise in terms of mathematical calculations or precise research in the area" (RT 1198). Mr. Nimmo, as the FAA editor of the script of the Wake Turbulence film was responsible for language such as:

> "So the heavier the aircraft, and the greater its load, the worse the turbulence will be"

and, having admitted to study of the Bleviss report (RT 1197), he must be assumed to have known that the recommended separation time therein for light planes following a DC-6B should be extended for the jet transports three times greater in weight:

> "Wake turbulence may remain severe in excess of five minutes."

And, having admitted to having studied the NASA reports, he must have been aware of the fact that NASA was receiving such reports from pilots (Exhibit 49, p. 7):

> "Controllers–caution pilots whenever wake turbulence is suspected to exist."

From which it seems safe to assume that Mr. Nimmo was not aware that the FAA practice with respect to turbulence warning was and is based on IFR-VFR spatial separation rather than upon elapsed time between the lead and following aircraft.

Upon all the evidence it is clear to the Court and we necessarily find that the final maneuver of the Cessna was physically beyond the control capacity of the aircraft, and could only have occurred as the result of something other than the aircraft. Upon the evidence in this case, the effects of wing tip vortices were the only outside force acting upon the aircraft.

The Plaintiffs presented four theories of liability—two based on ordinary negligence, and two based upon liability resulting from the violations of the safety regulations by the Government. The Court finds in favor of the Plaintiffs and against the Defendant upon each theory.

FIRST THEORY OF LIABILITY: The PAR Controller Was Negligent In That He Knew, Or Should Have Known, That A Hazard Existed In The Form Of Wing Tip Vortices From The Prior Missed Approach Of The Boeing 707, And Breached His Duty To Warn The Pilot Of This Hazard.

When the United States has undertaken to warn the public of danger and induces reliance thereby, it must perform the risk with due care. Indian Towing Company v. United States, 350 U.S. 61, 76 S. Ct. 122, 100 L. Ed. 48, 53 (1955).

This rule is applicable to the Federal Aviation Administration. United Air Lines, Inc. v. Wiener, 335 F.2d 379, 396 (9th Cir. 1964); Hartz v. United States, 387 F.2d 870, 873 (5th Cir. 1968).

This rule has express application with respect to the necessity of warning pilots concerning the existence of wing tip vortices. Furumizo v. United States, 245 F. Supp. 981 (D. Hawaii 1965), aff'd 381 F.2d 965 (9th Cir. 1967); Hartz v. United States, supra.

While it does not appear that the Air Traffic Control Procedures Manual was ever published in the Federal Register in a manner required to give it the force and effect of law in all respects, nevertheless it does have the force and effect of law in governing the FAA. As was held in Hartz v. United States, supra, 387 F.2d at 874, the PAR Controller must follow the Manual. It is the "Bible for Tower Operators." United States v. Miller, 303 F.2d 703, 710 fn 16 (9th Cir. 1962), cert. denied 371 U.S. 955, 83 S. Ct. 507, 9 L. Ed. 2d 502 (1963); Franklin v. United States, 342 F.2d 581, 585, fn 1 (7th Cir. 1965), cert. denied 382 U.S. 844, 86 S.Ct. 51, 15 L. Ed. 2d 84 (1965).

Moreover, it is expressly provided in 14 C.F.R., Sec. 26.26 as revised January 1, 1961, that the Air Traffic Control operator *shall* control traffic in accordance with the appropriate air traffic control manuals:

> "A certificated air traffic control tower operator *shall* control traffic in accordance with the procedures and practices as prescribed in the appropriate air traffic control manuals of the Federal Aviation Agency to provide for the *safe*, orderly and expeditious flow of air traffic in accordance with the following requirements: * * *" (Emphasis added.)

While the effects of wing tip vortices are not widely know or widely understood, the FAA was thoroughly familiar with the existence of the hazard from wing tip vortices. Many studies had been conducted in this field and these studies had been examined by the FAA. In addition, the FAA had conducted their own research in this field. It was, in fact, as a result of these studies that specific regulations were enacted by the FAA relating to the warnings which should be given concerning the hazards of wing tip vortices. These regulations are set

forth in Section 411.7 of the Air Traffic Control Procedures Manual. The history of the events leading to the adoption of these regulations is set forth at length by the District Judge in Furumizo v. United States, supra. As a result of these studies, a rule of thumb was formulated for a safe separation time when a DC-6B has executed a missed approach. That rule of thumb was found to be from 5 to 10 minutes.

But a rule of thumb effective for a DC-6B would not be effective for a Boeing 707, which is almost three times as heavy as a DC-6B. The FAA was well aware that the severity and duration of wing tip vortices increases directly with the increased weight of the aircraft producing the vortices and the FAA knew, or should have known, that a safe separation time between a Boeing 707 and a light plane under the conditions productive of severe turbulence would be 12½ minutes. This was conceded by the expert witness for the Government, John A. Zalovcik, in examination by the Court:

> "The Court: I want to know what you think. I would gather it would make some sense, that is assuming his rule of thumb is correct for a DC-6B. that the rule of thumb ought to be 12½ minutes for a 707; is that correct in your best judgment?
>
> "The Witness: "Yes." (RT 2229)

The Defendant argues that the individual PAR Controller here involved, whose duty it was to warn of the existence of turbulence, was not aware of the knowledge possessed by the FAA. The short answer to this is that the hazard of wing tip vortices turbulence was and is a clearly foreseeable hazard which the PAR Controller should have known, not only by virtue of the nature of the hazard itself, but also by virtue of his training and

experience as well as the duty of the FAA to communicate its knowledge of the hazard to him as one of its agents.

SECOND THEORY OF LIABILITY: The PAR Controller Was Negligent In That He Gave A Series Of Misleading, Confusing, Improper And Unduly Deferred Advisories To The Pilot.

During the approach, the PAR Controller advised the pilot that the approach would be terminated at the Middle Marker, which was a half mile from touchdown (at an altitude of 210 feet).[8] Later in the approach, the

[8]The three mile aximuth portion of the precision radarscope had an inherent problem at the Los Angeles tower arising from permanent radar echoes which returned as a row of little dots fused together at the narrow left-hand corner of the radarscope, and which rendered it difficult to see a moving blip and which was known as ground clutter. (RT 166–167; 2017; 3952). The FAA conducted engineering tests and reduced the intensity of the ground clutter, but some of the controllers were reluctant to assume the responsibility for issuing PAR advisories to light aircraft as the aircraft's target moved through the ground clutter on the radarscope. (RT 3951-3952; 3970-3971) On September 7, 1962, the FAA authorized the issuance of a Notice to Airmen, or NOTAM. (RT 3727, 3732, Exhibit AA) 14 C.F.R., Section 609.4(b), effective December 6, 1962, in its pertinent portion states:

> "* * * [W]hen unforeseen conditions are encountered in the establishment, realignment, or operation of the navigation facilities upon which the approach procedures are based, it may be necessary to accomplish without delay, a change in the published instrument approach procedures. Notices of such changes are disseminated by 'Q' codes and Notices to Airmen. Therefore, any person who intends to conduct an instrument approach shall check such notices to determine whether a change has been made in the published instrument approach procedures."

The first publication of the NOTAM occurred on November 6, 1962. (RT 3732-3733, Exhibit F) A copy of the NOTAM was sent

Controller advised the pilot that he had "passed" the Middle Marker without advising the pilot as to when he had passed the Middle Marker or *how far* past the Middle Marker the pilot was.

Section 300.1 of the Air Traffic Control Procedures provides:

> "Radar facilities shall provide radar service to IFR aircraft to the maximum extent practicable, consistent with workload, communications, and equipment capabilities." (Exhibit 17, p. 3-1)

That provision has been interpreted to obligate the PAR Controller to provide service to the pilot as long as he had a target in sight on the radarscope. (RT 854) The precision radarscope could get a return from a target west of the Middle Marker up to the point of touchdown, assuming no problem with ground clutter. (RT 1947-1948) The PAR Controller could follow the target all the way down over the threshold if the pilot was on glide path and on

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to the Los Angeles tower and the NOTAM was deemed binding on controllers (RT 1038; 3951; 3958-3959) The NOTAM stated:

> "Los Angeles International Airport Tower, PAR (Runway 25L) minimum ceiling 200 feet; visibility one-half mile; PAR unusable, west of ILS middle marker for aircraft below 12,500 pounds GWT on account of ground clutter." (RT 31)

The Cessna 310-G was less than 12,500 pounds. (RT 78) The rationale underlying the NOTAM was that the PAR Controller must be able to see the target down to the assigned PAR minimum so ground clutter should not be possible before the minimum. (RT 1055) The NOTAM in essence told the PAR Controllers to stop giving advisories at the Middle Marker and notified pilots that the PAR service would be stopped at the Middle Marker, and it did not tell the PAR Controllers that they could continue the service west of the Middle Marker if they desired. (RT 3962) It became a customary practice for PAR Controllers to state that the approach would terminate at the Middle Marker. (RT 82)

course. (RT 1949(It was normal to give advisories west of the Middle Marker until the point where the controller could not see the target. (RT 2063) The instructions to PAR Controllers were deemed conflicting, in that the NOTAM instructed that the PAR service should be stopped at the Middle Marker and the Air Traffic Control Procedures Manual instructed that the radar tracking and PAR advisories be continued as long as possible. (RT 3864; 3968-3969) The Air Traffic Control Procedures Manual was not recommended for the training of pilots. (RT 1336)

The PAR Controller who conducted the fatal approach interpreted Section 300.1 of the Air Traffic Control Procedures Manual as an overriding obligation requiring him to give every bit of radar service he could give to the pilot. (RT 3268-3269) Therefore, he continued to communicate to the pilot after the aircraft had passed the Middle Marker. (RT 3120) He followed a practice whereby he could continue to give advisories as long as the target was free of clutter, even right down to touchdown, although normally a PAR Controller turns the aircraft loose over the runway threshold. (RT 3679; 3859) He claimed that his initial advisory, "[T]his approach will be terminated at the Middle Marker," was given, because he had no way of knowing whether or not there would be ground clutter problems with respect to this particular aircraft when the aircraft reached the Middle Marker. (RT 3304) However, he told the pilot he would take him to a certain point on the glideslope and would terminate the approach there; he never advised the pilot once the target was observed at that point; he did not terminate the approach at the Middle Marker; and he never advised the pilot he was going to extend the approach to a new termination point. (RT 3287-3288)

John McCormick, who worked from 1954 to 1965 in the FAA area office of Los Angeles International Airport, testified to the origin of the practice whereby PAR Controllers at Los Angeles advised pilots when the aircraft was passing the Middle Marker. The PAR equipment was used primarily to monitor ILS approaches. (RT 3677) Under this procedure, the radarscope is observed as a secondary navigational aid; the controller might remain silent throughout the ILS approach if the pilot does not deviate from the glide path or he might advise the pilot if the aircraft is above or below the glide path; the controller says less than he would in the case of a full PAR approach. (RT 1701-1702) Knowledge by the pilot when the aircraft reached the Middle Marker was an inherent part of the ILS approach. (RT 2867-2870) Starting in 1950 it became customary practice for a Los Angeles PAR Controller monitoring an ILS approach to advise, "passing the Middle Marker," when the aircraft was over the Middle Marker. (RT 1958; 1986) The practice of giving this advisory that the aircraft was passing the Middle Marker was carried over into the procedure followed in full PAR approaches. (RT 3677) The practice had the tacit approval of the FAA. (RT 2711) The advisory was not provided for by the Air Traffic Control Procedures Manual. (RT 3676) However, the FAA permitted a local facility to adopt a practice not provided for in the Manual in order to account for a local condition. (RT 2859-2860; 2888-2889) At Los Angeles, aircraft made many ILS approaches that were monitored by the PAR Controllers. (RT 2713) The advisory provided a double check to a pilot making an ILS approach that his marker beacon receiver was turned on. (RT 3675) The pilot could associate the Middle Marker with the ILS landing minimum. (RT 1694) The advisory alerted pilots

that the monitoring service would be stopped and that this was the point at which the approach procedure might not be able to be carried on. (RT 2710) An advisory that the aircraft was at the Middle Marker was not deemed an invasion of the pilot's area of responsibility because it is the pilot who uses the Middle Marker. (RT 1699)

Pilots have heard PAR Controllers at Los Angeles tower advise that the aircraft was over the Middle Marker. (RT 309) Normally the Middle Marker is located at a point along the glideslope where the lowest published minimums are reached. (RT 4409) The advisory that the aircraft is passing the Middle Marker is virtually the same as telling the pilot he is at minimums. (RT 3674) At Los Angeles International Airport Runway 25 Left, the Middle Marker intercepts the glideslope at 209 feet altitude and the aircraft arrives at the minimum altitude of 200 feet or the decision height in less than a second. (RT 3673-3674) Thus, the advisory would give a pilot a little advance notice before the aircraft is at minimums, so the pilot could condition himself for going around or continuing. (RT 3674-3675) If the pilot is not advised that he is passing the Middle Marker and is below minimums, there is a possibility that the pilot did not get a chance to react at his minimums. (RT 3675) The Middle Marker is a landmark on the approach in the area of 200 feet altitude above the ground, where the pilot must make his decision. (RT 1789-1790)

The PAR Controller who conducted the fatal approach usually followed the practice of telling the pilot that he was passing the Middle Marker as a current event. (RT 3131; 3234) Nevertheless, on this occasion the only advisory that he gave the pilot concerning the position of the aircraft in relation to the Middle Marker used the past tense, "passed the Middle Marker". (RT 3238; 3243;

3263) It was estimated that the PAR Controller waited 35 to 45 seconds after the aircraft had already passed the Middle Marker to advise him that he had passed the Middle Marker, assuming from subsequent advisories that the aircraft was coming up over Aviation Boulevard. (RT 1935) At one point a Government witness testified that there was sufficient time to advise the pilot that the aircraft had arrived at the decision height. (RT 1994-1995) There had only been two aircraft operations in twelve minutes and this was not a congested situation. (RT 2909) The Controller had time to tell the pilot other things between the pilot's "put me right down on the runway" and the Controller's "take over visually". (RT 3217) The PAR Controller gave no reason why he departed from his own customary practice of advising the pilot when the aircraft was passing the Middle Marker as a current event. (RT 3243) At 4:09 P.M. he advised the pilot, "Now passing abeam the Hollywood Race Track" (Exhibit 4A, p. 8). He suggested the possibility that he was busy adjusting the radar gain to get the target more clearly in focus when it was moving past the Middle Marker. (RT 3299) However, he added that the gain is varied continuously throughout the approach to get a more workable target and the PAR Controller merely works harder as the target moves closer. (RT 3301) It was also suggested that, as the airplane was passing the Middle Marker, the PAR Controller may have been giving a heading change or an altitude deviation which was more important. (RT 2938) However, it was admitted that the Middle Marker was an aid, since it was set at the approach minimums. (RT 2432) The PAR Controller who conducted the fatal approach knew that the minimums for the approach were approximately at the Middle Marker and, since he did not tell the pilot when he was passing

the Middle Marker, he assumed that the pilot would rely on his altimeter to know when he reached his minimums. (RT 3308-3309)

The three-mile precision radarscope has a half-mile range mark which is a half nautical mile from touchdown, and the Middle Marker is located 985 feet east of the half mile range mark. (RT 2010-2011; 2015; 3134; 3233) The average controller knows within 25 feet, or about three seconds, when the aircraft has reached the landing minimums. (RT 1057-1059)

The PAR Controller continued the approach to a point at which he felt the safety of the aircraft was imperiled. On the three mile radarscope elevation display, there is a line on each side of the glide path line representing a half degree deviation in the space above and below the glide path, and these lines depict a safety zone which represents the maximum limits an aircraft can deviate from the glide path without: (1) approaching too close to obstructions if below the lower limit, (2) being too far above the glide path to complete a normal approach if above the upper limit (Exhibit 13, p. 35). The safety limit lines on the three mile radarscope used for this approach terminated at a point about one half mile from touchdown and at that point the safety limits are almost touching the 25 foot deviation lines. (RT 2136, Exhibit 13, p. 32) Therefore, if the aircraft was 25 feet low, west of that point, it would necessarily be outside the safety limits, because at the half mile point a target 25 feet above or below the glide path would be outside the safety limit lines. (RT 2042; 3191) In this approach of the Cessna, and up to the half mile point the aircraft radar target stayed within the safety limit lines etched on the radarscope display. (RT 3140; 3142; 3157)

When this target continued its descent westward beyond the half mile point and was observed to go 25 feet below the glide path, in the Controller's judgment the safety of the flight was likely to be affected, since if the pilot was not in visual contact and he continued to stay 25 feet below the glide path he might hit an obstruction. (RT 3122; 3176; 3182) As the pilot approached touchdown, he would be in more and more danger. (RT 3192)

Under Section 344.9 of the Air Traffic Control Procedures Manual, the following procedure is required:

> "If an aircraft exceeds the lower and/or lateral limits of the prescribed safety zone to a point where, in the judgment of the controller, safety of flight is likely to be affected, the pilot shall be instructed to climb to a specified altitude and fly a specific course, as appropriate." (Exhibit 17, pp. 3-15)

Under Section 394.7 of the Manual, the following negative phraseology is required:

> "To instruct a pilot to discontinue approach when the aircraft exceeds safety limits: IF RUNWAY NOT IN SIGHT, CLIMB IMMEDIATELY TO (altitude), TURN LEFT/RIGHT, HEADING (degrees), (reason and further clearance, if appropriate), ACKNOWLEDGE." (Exhibit 17, p. 3026)

Normally, the pilot responds "Roger". (RT 327-328) The PAR Controller responsible for the fatal approach admitted that to the extent that he thought that "safety of flight is likely to be affected," Section 344.9 came partially in effect. (RT 3184) He explained that, when a PAR Controller sees a target drop to 25 feet below the glide path at a point west of the half-mile point, the Controller cannot assume that the pilot has visual contact with the runway even if the reported weather is VFR, so

the phraseology used is "IF RUNWAY NOT IN SIGHT" the pilot should execute a missed approach (RT 3178) He admitted that if the target was below the safety limit lines before it got to the half mile point and the Controller felt that the safety of the flight was likely to be affected, the Controller was required to follow Section 344.9 of the Manual. (RT 3193) He admitted that, when the target was further west of the half mile point, the risk to the safety of the flight would be greater because the plane is physically closer to the ground. (RT 3197) He wanted the pilot to see the approach lights or the runway lights and, if he did not see them, he wanted the pilot to climb westbound to VFR conditions on top. (RT 1951-1952) The required phraseology is considered mandatory, because the intent of the language is that the pilot either land or execute a missed approach. (RT 3061-3864; 3866) Government witness McCormick admitted that the only guidance the pilot has is the PAR Controller if he wants to complete the approach safely and that, if the Controller makes a mistake, it isn't the pilot's fault. (RT 3867)

After the PAR Controller told the pilot to adjust descent, he didn't follow through. (RT 1949-1950) Instead the PAR Controller gave the instruction:

> "[T]ake over and complete your landing visually on runway two five left if you're not ah contact execute a missed approach climb westbound to VFR conditions on top." (Plaintiffs' Exhibit 4A, p. 9).

He did not use the required negative phraseology, "IF RUNWAY NOT IN SIGHT, CLIMB IMMEDIATELY." He did so at a time when the pilot was definitely below the 200 feet minimum altitude. (RT 3277) He tried to justify the change on the basis that the phraseologies were equivalent, but they were not. (RT 3251) In fact,

the words, "take over and complete your landing visually," constituted an instruction, as distinguished from an advisory. (RT 2519-2520) He claimed that he assumed that the pilot was in visual contact at that portion of the approach, because the pilot should have previously established visual contact at the minimums and the pilot had previously asked, "put me right down on the runway". (RT 3185-3187; 3193; 3465) Yet, earlier in his testimony, the PAR Controller admitted that the reason for the phraseology, "IF RUNWAY NOT IN SIGHT," was that the Controller could not assume that the pilot had visual contact with the runway even if the reported weather is VFR, when a target goes 25 feet below the glide path west of the half-mile point. (RT 3178) He admitted that a pilot had a reaction time after any advisory. (RT 3201) Pilots were known to take 4 to 5 seconds to correct a heading. (RT 1473) Even if the pilot had stayed on course and glide path and had not descended below the glide path, when the aircraft reached the end of the runway, where the PAR approach would normally be terminated and the advisory required by Section 394.10 of the Air Traffic Control Procedures Manual would be given, the phraseology used would be "over end of runway, take over visually," but there would be nothing said about "complete your landing". (RT 3265-3267)

While the PAR Controller did not define the peril which then endangered the aircraft's safety, it is clear from the evidence that disorientation of the pilot is one of the perils that the PAR Controller could have negligently generated by his misleading, confusing, improper and unduly deferred advisories. Having led the pilot to this circumstance, it was the duty of the Controller to advise the pilot of the existence of an emergency condi-

tion in order that the pilot might take such measures as he deemed appropriate. Restatement of Torts, 2d, § 321:

"Duty to Act When Prior Conduct is Found to be Dangerous.

(1) If the actor does an act, and subsequently realizes or should realize that it has created an unreasonable risk of causing physical harm to another, he is under a duty to exercise reasonable care to prevent the risk from taking effect.

(2) The rule stated in Subsection (1) applies even though at the time of the act the actor has no reason to believe that it will involve such a risk.

Comment:

(a) The rule stated in Subsection (1) applies whenever the actor realizes or should realize that his act has created a condition which involves an unreasonable risk of harm to another, or is leading to consequences which involve such a risk. The rule applies whether the original act is tortious or innocent. If the act is negligent, the actor's responsibility continues in the form of a duty to exercise reasonable care to avert the consequences which he recognizes or should recognize as likely to follow. But even where he has had no reason to believe, at the time of the act, that it would involve any reasonable risk of physical harm to another, he is under a duty to exercise reasonable care when, because of a change of circumstances, or further knowledge of the situation which he has acquired, he realizes or should realize that he has created such a risk."

This rule was adopted and followed by the Ninth Circuit in the case of Furumizo v. United States, supra, 381 F.2d 965 at 968-969 (9th Cir. 1967).

Disorientation is the inability of a pilot to sense accurately the attitude of the aircraft and occurs when a pilot,

flying under instrument conditions, diverts his attention from instrument reference in the cockpit in order to see a visual reference obscured by fog. Disorientation has been the subject of consideration by the FAA in connection with the conduct of a precision approach.[9]

It is a foreseeable risk of harm that the phraseology, "Complete your landing visually," in a communication from the PAR Controller to a pilot whose reliance thereon has been engendered, might induce a competent instrument pilot to prolong his lookout by trying to find enough runway on which to make a landing out of his approach as he traverses an area of fog.[10]

The inducement of prolonged lookout by a pilot trying to find enough runway on which to make a landing out of his approach as he traverses an area of fog so increases the hazard that the pilot may be unable to overcome disorientation. Disorientation of a pilot can be overcome only by the total concentration of the pilot upon his instruments to the exclusion of any sensation to which he may otherwise be subjected with regard to the attitude of the aircraft.[11]

It was the uniform custom and practice at the time of the final approach herein for PAR Controllers to use uniform phraseology, because pilots might become familiar with phraseology which, if not used on all occasions, might induce confusion and disorientation thereby exposing the persons in the aircraft to hazard.[12]

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[9]RT 1238, 1266-1267, 3809-3810.

[10]RT 1241-1243, 3975-3976.

[11]RT 1272-1273.

[12]RT 2665,2991.

The PAR Controller here failed to discharge his duty of due care when he informed the pilot, "Take over and complete your landing visually." He violated the Air Traffic Control Procedures Manual, §§344.9 and 394.7 (Exhibit 17). He negligently failed to instruct the pilot to "climb immediately." He negligently failed to use the uniform terminology which would be necessary to convey to the pilot the fact that in the judgment of the PAR Controller the flight was in danger. He negligently failed to obtain an acknowledgement from the pilot. The phraseology selected by the PAR Controller for the final communication increased the risk of harm by the use of the words "Complete your landing visually."

The pilot quite reasonably might have prolonged his diversion from his instruments while attempting to complete his landing visually as a normal response to the negligent final communication of the PAR Controller: "Complete your landing visually." The phraseology selected by the PAR Controller may well have induced confusion and disorientation in the pilot, exposing him, the passengers in the aircraft and the persons on the ground, and their property, to all reasonably foreseeable hazards, including the disorientation of the pilot and other forces such as the effects of wing tip vortices. Had the PAR Controller used the mandatory language of Section 394.7 and instructed the pilot to "climb immediately," the dangers of disorientation and wing tip vortices would have been averted. His failure to do so was negligence and a direct and proximate cause of the crash of the Cessna, the deaths of the pilot and passengers, the injuries to the mechanic on the ground and the accompanying property damage.

THIRD THEORY OF LIABILITY: The PAR Controller Was Negligent In Failing To Give The Warning Required By The Air Traffic Control Procedures Manual. §411.7.

Section 411.7 of the Air Traffic Control Procedures Manual provides as follows:

> "When controllers *foresee* the *possibility* that departing or *arriving* aircraft might encounter rotorcraft downwash, thrust stream turbulence or wing tip vortices from preceding aircraft, cautionary information to this effect should be issued to pilots concerned.
>
> Note–Since the existence and effect of turbulence is unpredictable, the provision of the above information does not constitute the placing of responsibility on controllers to anticipate in all cases the need for such information."
>
> (Emphasis added.)

This requires that the PAR Controller must exercise his judgment and issue a warning when he foresees a possible danger from wing tip vortices. The word "foresee" as utilized in this section of the Manual contemplates the examination of existing conditions and the exercise of judgment. Section 411.7 contemplates that the Controller will examine the conditions present and will, in the exercise of his judgment, determine if there is a possibility of hazard from wing tip vortices; then if it is determined that there is such a possibility, he is required to issue a warning. The obligation of Section 411.7 cannot be performed unless the Controller exercises judgment. Yet it was the practice of the PAR Controller here involved never to exercise judgment in determining

whether there was a possibility of hazard in vortices.[13] This practice is a violation of the regulation.

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[13]The first witness called in the trial was A.B. Bush, the Chief of the Los Angeles tower, who, when asked whether there was a custom and practice among the controllers as to the length of time that would be observed between aircraft before a warning was given responded (RT 169): "I would guess as a practice two or three minutes"; and went on to state there was no specified length of time observed between a very light aircraft and a very heavy aircraft. He knew no basis for the two or three minute separation time and could recall no school or educational process prior to December 6, 1962, at which the controllers or anyone in command at the tower were made acquainted with the phenomenon of wing tip vortices. (See also, testimony of Merle Nichols, RT 2066) Perhaps the most cogent testimony on this phase of the case was that of Mr. Edmund Burke who told the Court that the IFR-VFR separation standards which were established in the early 1950's (RT 987) were still the standard for the controllers insofar as separation of aircraft for turbulence warning purposes are concerned:

"A If it gets substantially beyond that into the area of two or three miles, it is not issued; that is correct.

"Q All right. So that is the standard—I mean that's the only criteria as to issuing or not issuing, as I understand your testimony?

"A That's the practice, yes, sir.

"Q That is the general practice among controllers across the U.S., and you are assuming, and we are to assume, that that was the practice in 1962 at Los Angeles International Airport?

"A Yes, sir.

* * * * *

"Q I mean it doesn't make any difference to him, he doesn't make a judgment as to whether—well, this three mile separation involves one very large aircraft and one very small one? As long as there are three miles there, he has made his decision; isn't that right?

"A Yes, sir, that's true.

"Q And similarly, if there is a varying wind condition or weather condition, the controller does not take that into account as long as he has the set three-mile separation?

The failure to exercise judgment when required by the Air Traffic Control Procedures Manual is a breach of air

"A I would say this is true, yes sir." (RT 989)

This witness went on to testify that the spatial separation was applied irrespective of the speed of the aircraft. (RT 995) Mr. Burke admitted that the practice simply grew among the controllers:

"Q Is there any other standard set by the FAA for controllers with respect to turbulence other than this three and 1½ mile separation we have discussed?

"A Now, the agency has never set a standard. The standard has been adopted by the controllers through their work experience. So, it becomes a practice.

"Q In other words, when you said here last Friday [as] far as the book is concerned, it is very, very loose guidance to the controller, is that right?

A I would say it is very broad." (RT 996)

* * * * *

"Q In your opinion a practice has been built up, grown like Topsy, as the Court said yesterday, with respect to a rule of thumb that you are using. That rule of thumb has nothing to do with time separation of the aircraft, and only has to do with the spatial separation of the aircraft, isn't that true?

"A In my opinion, this is true, yes sir." (RT 1769)

A key part of Mr. Burke's testimony was given with respect to Exhibit 55, an Air Traffic Service Bulletin issued by the FAA on November 15, 1962, which contained information gathered by the Agency in the time prior to its publication. (RT 1000) This Exhibit, referred as it does to the Bleviss report of 1954, unequivocally charges the FAA with knowledge of the rule of thumb separation time recommended in the Bleviss report, which was the only Douglas report on vortices prepared prior to 1962, the date of the ATS Bulletin.

Examination of the testimony of Gerald Feltman, the PAR Controller in this particular instance, is the culmination of the practice of the FAA and its controllers. Mr. Feltman had received no specific training as to wing tip vortices or the effect of wind conditions upon the persistence of the turbulence resulting from vortices (RT 3336-3338) and did not see a training film on the subject until 1965. He was never instructed prior to December,

safety regulations and constitutes negligence. Furumizo v. United States, supra, 245 F. Supp. 981 at 992 (D. Hawaii 1965).

Section 411.7 provides that this service shall be performed for both departing and arriving aircraft. The practice of this PAR Controller was never to provide this service to arriving aircraft. The Air Traffic Control Procedures Manual requires a separation distance of one mile between aircraft under VFR conditions and three miles under IFR conditions. The PAR Controller arbitrarily adopted the practice that warnings for wing tip vortices would never be given if under VFR conditions there was a one mile separation and if under IFR

1962 that with a light crosswind a separation time between a light aircraft and a DC-6B would be five to ten minutes, and that aircraft larger than a DC-6B could create stronger vortices and more turbulence. (RT 3339) He was never formally instructed how long the turbulence created by a large jet aircraft could possibly last nor was he ever told prior to the accident date that turbulence could be hazardous to light aircraft at time intervals beyond five minutes. (RT 3340) Prior to December, 1962, he had never received any specific instructions with reference to the time a light aircraft should be separated from a large jet aircraft making a missed approach. (RT 3341) There was no exercise of judgment in issuing or not issuing a turbulence warning and that was true in the instant case.

"Q * * * Now I want to know whether or not that is what you did in this case of the Cessna. There was no other aircraft within three miles of it, so you gave no warning?

"A I really don't recall the approach or anything, but as normal operating procedure this is the reason I would not have given it.

"Q AND UNDER A SITUATION LIKE THAT, YOU WOULDN'T EVEN MAKE A JUDGMENT ON IT? YOU SIMPLY WOULDN'T GIVE IT?

"A IN THAT PARTICULAR CASE, OR IN THIS PARTICULAR CASE, THAT IS CORRECT." (RT 3344, 3345)

conditions there was a three mile separation, although the purpose of these separation distances was for interspatial safety and not turbulence safety. The effect of the practice was that vortices warnings were never given to arriving aircraft and this practice obviously completely nullifies the safety regulations of Section 411.7 as to arriving aircraft.

The FAA was fully aware that these mere separation distances were not sufficient under all circumstances to protect against the hazards of wing tip vortices. This awareness is fully apparent from examination of the legislative history of Section 411.7 reported in Furumizo v. United States, supra, 245 F. Supp. 981 at 1002-1010. The practice of the FAA controllers in general and the PAR Controller here involved, in eliminating this service cannot be condoned as the exercise of a discretionary function. The FAA has no discretion to eliminate a service which is required by regulation. United Airlines, Inc. v. Wiener, 335 F.2d 379 (9th Cir. 1964). The IFR-VFR separation distances do not apply to departing aircraft. Cf. Hartz v. United States, supra; Furumizo v. United States, supra. Yet the regulation, Section 411.7, specifically and expressly requires warnings to both departing and arriving aircraft.

In a Federal Tort Claims Act case, the court applies the law of the place of the tort. Roberson v. United States, 382 F.2d 714, 717 (9th Cir. 1967); Bartholomae Corp. v. United States, 253 F.2d 716, 73 A.L.R.2d 1293, 1299 (9th Cir. 1957).

When a violation of a safety regulation constitutes negligence per se under state law, such rule is applicable under the Federal Tort Claims Act. Cronenberg v. United States, 123 F. Supp. 693 (D. N.C. 1954); Cerri v. United States, 80 F. Supp. 831 (N.D. Cal. 1948); Worley v. United States, 119 F. Supp. 719 (D. Ore. 1952).

In those jurisdictions in which the violation of a safety regulation is negligence per se, the violation of a safety regulation promulgated by the FAA is negligence per se. Eastern Air Lines v. Union Trust Company, 95 U.S. App. D.C. 189, 221 F.2d 62 (1955).

Under California law, violation of a safety regulation enacted by an administrative agency raises a rebuttable presumption of negligence. Nevis v. Pacific Gas & Elec. Corp., 43 Cal. 2d 626, 275 P.2d 761 (1954).

Where there has been a violation of a safety regulation, the burden of going forward with the evidence shifts to the defendant to excuse such violation by establishing any one of the following:

1. That it was beyond the ability of the defendant to comply with the regulation.
2. That the action taken by the defendant was what might reasonably be expected of a person of ordinary prudence acting under similar conditions who desired to comply with the law.
3. That the defendant was non-negligently ignorant of the facts which made the safety regulation applicable.

Lokey v. Pine Mountain Lumber Co., 205 Cal. App. 2d 522, 23 Cal. Rptr. 293 (1962); Nevis v. Pacific Gas & Elec. Corp., supra.

Upon the foregoing, the Court finds that there was a violation of a safety regulation. Whether it constituted negligence per se or merely raised a rebuttable presumption of negligence, the Defendant has not established that such violation was excusable.

FOURTH THEORY OF LIABILITY: The PAR Controller Was Negligent In Failing To Give The

Instruction Required By The Air Traffic Control Procedures Manual, § § 344.9 and 394.7.

Section 344.9 of the Air Traffic Control Procedures Manual provides as follows:

> "If an aircraft exceeds the lower and/or lateral limits of the prescribed safety zone to a point where, in the judgment of the controller, safety of flight is likely to be affected, the pilot shall be instructed to climb to a specified altitude and fly a specific course, as appropriate."

During the approach, and as the Cessna neared the ground, at one point the aircraft was 25 feet below the glide path and at this point the PAR Controller felt that the safety of the aircraft was imperiled. This judgment by the PAR Controller imposed upon him an additional obligation to advise the pilot to "*climb immediately*." The express mandatory terminology is set forth in Section 394.7 of the Air Traffic Control Procedures Manual which provides as follows:

> "To instruct a pilot to discontinue approach when the aircraft exceeds safety limits: IF RUNWAY NOT IN SIGHT, CLIMB IMMEDIATELY TO (altitude), TURN LEFT/RIGHT, HEADING (degrees), (reason and further clearance, if appropriate), ACKNOWLEDGE."

The PAR Controller did not use the mandatory language specified in this section, but instead instructed the pilot as follows:

> "* * * going twenty five feet below the glide path adjust descent take over and complete your landing visually on runway two five left if you're not ah contact execute a missed approach climb westbound to VFR conditions on top." (Plaintiffs' Exhibit 4A, p. 9)

There are circumstances in which it is negligence to fail to utilize the mandatory language of the Air Traffic Control Procedures Manual. This was the situation in Hartz v. United States, supra, 387 F.2d at 874 (5th Cir. 1968), in which the FAA Controller warned the pilot of wing tip vortices by using the words "watch the prop wash" instead of utilizing the mandatory language, "caution, turbulence." The reasoning of the court in holding this to be negligence was that "prop wash" is of less severity than "wing tip vortices," and, therefore, the pilot was misled by the language. A comparable circumstance exists in the case before us.

The evidence here shows that there are two acceptable methods of executing a missed approach. One involves an immediate climb, and the alternate involves a more gradual ascent by gaining speed prior to climbing. In a nonemergency situation either one is an acceptable method. However, in an emergency situation such as the one the PAR Controller believed to be confronting the pilot in the present case, the safer method was clearly to climb immediately. The mandatory language required by Section 394.7 recognizes that there are a variety of hazards which may exist at low altitudes which can be escaped by climbing immediately. The pilot in this case encountered one of these hazards which can exist at low altitudes, namely, wing tip vortices, and possibly another such hazard, disorientation, and the crash was a proximate result of the fact that the pilot was not instructed to climb immediately.

Accordingly, the Court finds that the failure of the PAR Controller to instruct in the language of the Manual was a violation of the safety regulations, Section 394.7, and was negligence which was a direct and proximate cause of the crash.

The principal defense of the United States was that it is physically impossible for severe hazards from wing tip vortices to have existed for a period of ten to twelve minutes. This argument was predicated upon a hypothesis based on a formula that wing tip vortices can only remain violent for one to two minutes. This theory suffers in two respects. First, the formula itself contains certain assumed and unproven values; and second, the formula does not work in actual experience. Several pilots presented testimony that they had encountered violent wing tip vortices long after the one to two minutes such vortices could have lasted if the formula was accurate.

The Court accepts the testimony of these pilot witnesses who actually experienced violent wing tip vortices from 3½ to 7½ minutes after the passage of aircraft, and must, therefore, exclude the validity of the formula.

The United States presented no acceptable explanation for the crash. The evidence excludes any failure on the part of the pilot or the aircraft. The final violent maneuver was beyond the controlled capacity of the aircraft. The Court necessarily finds that it occurred as the result of turbulence from wing tip vortices, the only outside force acting upon the aircraft.

Since there are two acceptable methods of executing a missed approach, and since it is apparent from the evidence that the pilot was beginning to execute one of these methods, the Court finds no contributory negligence on the part of the pilot.

A missed approach or go-round is the terminology used to describe the situation in which an aircraft which has made an approach for landing, and for one reason or another, aborts the landing and proceeds in a designated

course over the runway, regains full flying speed, and proceeds either to another landing attempt or to another airport, dependent upon the reason for the missed approach.

Customarily on a PAR approach, the pilot is advised at the outset what the missed approach procedure for the particular runway is. Thus at Los Angeles International Airport, where there are no obstacles such as buildings or trees between the airport and the Pacific Ocean on the west, the procedure is to fly straight ahead and climb to an altitude of 2000 feet within a distance of 20 miles. There is no evidence that there is any regulatory or other requirement that an aircraft attain any other specific intermediate altitude at any particular point on the missed approach. This was pointed up in the testimony of the witness David Irvine on cross-examine [sic] by Mr. Fareed:

"Q Assume that at the point of decision at the point where he decided he didn't have visual contact, he was at 57 feet over Aviation Boulevard, and that in the course of the attempted missed approach, which I take it is your opinion in this case, he attempted a missed approach, in the course of that missed approach he failed to retract his landing gear and flaps; would that affect in any way, in your opinion, that this missed approach procedure was prudently exercised under those adverse circumstances?

"A In no way, no way. The easiest, shortest way to the ground is panic. And if he starts immediately pulling switches, when you have plenty of time—he has got 20 miles to get his gear and flaps up." (RT 4378)

Two chief areas of controversy appear to have arisen with respect to the conduct of the flight from the point where the pilot was instructed to take over visually and land or if not contact to climb to VFR conditions on top. The first of these is whether he was, in fact, making a missed approach from the takeover point to the point some 3000 feet down the runway where the plane veered to the left and crashed. Factually, there appears to be no question that full power was added to both engines some thirty seconds prior to the time of the actual crash as testified to by one of the few percipient witnesses in the trial, Mr. Bernard T. Siefert, an industrial fireman employed by North American Aviation Company, whose duty station at the time of the crash was at a point between the point of crash and Runway 25 Left.

"Q Prior to the time of that crash, did you or not have occasion to hear any airplane engines?

"A Yes Sir, I did.

"Q And would you state how those engines sounded?

"A Well, when I first heard them they were what I would–in my opinion was a normal cruising speed or normal plane in flight. About a minute or so later it sounded to me like the pilot had pushed the throttle, full throttle, full power on his plane. About thirty seconds later I heard the crash.

"Q Now, you have been around the airport or have been around the airport for some period of time working?

"A Yes Sir, I have.

"Q And did you have experience of hearing the airplane engines on small planes, light planes?

"A Yes, Sir, I have.

"Q This change of power to the higher power, what was that like? Would it be similar to a plane with its engines full open for take off, or something like that?

"A Yes Sir. As I said, it sounded to me like he had pushed his throttle all the way full, and was getting full power–attempting to get full power from the aircraft." (RT 451)

The witness went on to reaffirm a previous sworn statement that the power was added some 30 to 60 seconds prior to the crash itself. This estimate of time at which full power was added is consistent with the distance travelled by the aircraft from the point of takeover to the point of crash. Mr. Siefert was not cross-examined nor was contrary evidence adduced. The evidence, in the form of time indications on the tower tape, shows with certainty that the elapsed time from the point where the pilot was told to take over and the point where the plane disappeared from the ASDE radar was 36 seconds.

There is uniform agreement among the expert pilot witnesses from both sides that the first action of a pilot in executing a missed approach is the application of full power to the engines by advancing the throttle controls:

Vance Breese	–(RT 406);
Mervyn A. Davenport	–(RT 2472);
Frances Tanner	–(RT 2781);
David Irvine	–(RT 4348, 4368);
John McCormick	–(RT 3972; and
Elwin Sullens	–(RT 347).

This is consistent with the provisions of the Operating Manual in evidence as Exhibit H, at pp. 2-6:

"Go Round (Twin Engine)

(1) Apply full throttle and increase engine speed to 2625 RPM, if necessary.

(2) Reduce flap setting to 15°

(3) Trim airplane for climb.

(4) Retract flaps as soon as all obstacles are cleared and a safe altitude and airspeed are obtained."

There was agreement among the pilots that landings are not conducted with engines at full throttle. Government pilot witness, Cyril Tanner:

"Q Have you ever heard or seen an airplane land with throttles full up?

"A Have I ever heard or seen–

"Q Heard of or seen an aircraft land with throttles full up?

"A Not to my recollection." (RT 2811)

Plaintiff pilot witness David Irvine:

"Q * * * –is the fact that the throttles were described as being full open, is that consistent with a missed approach?

"A Yes, Sir, it would be.

"Q Is there, usually speaking, from a pilot's standpoint any likelihood of a landing being accomplished or attempted with throttles full open?

"A No, Sir, there is not." (RT 4348)

Other evidence on the missed approach question comes from the series of remarks among the controllers who were observing the progress of the aircraft on the ASDE radar equipment after the takeover point. Such remarks

should be considered in the light of the fact that the speed of a landing aircraft decreased noticeably and the further fact that these controllers, through experience, are able to accurately determine the conduct of an aircraft through the radar return. The questioning centers around interpretation of a series of controllers' remarks or exclamations which were found on the control tower tape. (RT 479) Witness Vance Breese:

"Q My question to the witness is: Was there any significance to this statement, 'Well, I don't know if he is on the ground he is going to beat hell'?

"A Yes, I think it is a very clear indication of a missed approach procedure.

"Q And the next statement is local controller to ASDE, according to Government's Exhibit, 'Ah he is going around': What does that mean?

"A That means he is executing a missed approach procedure.

"Q Now, these statements, according to the transcript which was just handed to his Honor, are made at about 4:10:50 in point of time?

"A Yes, Sir.

"Q The statement by one of the controllers, 'He looks like he is hauling the mail and hasn't slowed it down any': Does that have any significance?

"A Yes, that again indicates clearly that he had no intention to land. He was executing a missed approach procedure. He has increased his speed to a point which would permit him to climb on out.

"Q The words 'he missed,' what does that 'missed' mean?

* * * * *

"A It means the conditions would not permit him to land. Therefore, he executed a missed approach procedure. He could not see the necessary 2600 feet down the runway which would have permitted him to land legally. Therefore, he increased his speed to climb on out." (479-480)

It is noteworthy that these interpretations of the meaning of the exclamations by the controllers were not challenged by the Government at any point in the trial by producing the controllers to testify.

It cannot be determined definitely whether the wheels and flaps were retracted. No eye witness to such fact was produced. It comes only as an inference from certain facts obtained after the crash. The investigator, Robert Gilmour, was permitted to testify only to what he found upon examination of the wreckage and not to a conclusion that such condition existed at the time of impact. (RT 3529) The position of indicators and levers in the cockpit of the Cessna 310–G aircraft when examined following the crash must be viewed with regard to the severity of the impact and the extent of the destruction as shown in the photographs of the wreckage (Exhibits 16–16A in evidence). And if, from such evidence, an inference is permitted that the wheels and flaps were down during the initial stages of the missed approach. this condition could not have any causal effect upon the crash. The instruction manual (Exhibit H, pp. 2-6, quoted above) does not even require that the wheels be retracted in a go-round procedure and the flaps are left down to 15° according to the recommended procedure. The testimony of David Irvine, a witness for the Plaintiff, goes directly to the point. Mr. Irvine has been a pilot for 38 years, flew with the armed services for 14 years, and is a

designee of the FAA to administer private and commercial flight tests to applicants for pilot ratings:

"Q Is it absolutely necessary in making an efficient missed approach to have the wheels up over the first 3,000 feet?

"A It is not.

* * * * *

"Q These questions are directed to a Cessna 310 within the confines of what we are talking about here in this case. Do you understand that?

"A I understand.

"Q Is it absolutely necessary in making a missed approach to have the flaps full up during the first 300 feet?

"A It is not."

"Q You see nothing unusual in this missed approach?

"A No, Sir." (RT 4348)

The question with respect to the contended requirement that a pilot initiate a climb immediately upon starting a missed approach was the subject of varying testimony and opinion from the experts. Generally speaking two Government pilot witnesses, Mervyn Davenport and Cyril Tanner, took the view that the climbing attitude should be taken as soon as the missed approach was initiated. Plaintiff pilot witness, Vance Breese, was one [sic] of the opinion that speed is the crucial factor (RT 591) and that a pilot might very well disregard increasing altitude immediately in favor of builting up airspeed (RT 696):

"A I think he was encountering turbulence that was quite unexpected, and it was keeping him busy in the cockpit to a point where he felt he was better off with the speed in order to improve the controllability of the aircraft rather than with altitude.

"Q In that connection you used a phrase yesterday of trading altitude for speed. What do you mean by that?

"A You trade altitude for speed, and conversely by climbing he reduces the speed. By keeping the nose down he increases the speed without climbing.

"Q What does that reduction in speed do to the controllability of the aircraft?

"A It reduces the controllability of an aircraft in that region.

"Q When you used the phraseology 'trading altitude for speed', was it your intent to state that you felt that he had continued straight ahead to get up speed rather than climbing out?

"A Precisely.

"Q Is there anything negligent—strike that. Is there anything improper about a pilot trading altitude for speed?

"A Not at all.

"Q Does it depend on each pilot as to what he desires to do under any particular instance?

"A The pilot and the conditions."

Two of the pilot witnesses who were not on the same side of the case appeared to have similar opinions on the subject. They were David Irvine, called by Plaintiffs, and John McCormick, called by Defendant. These two witnes-

ses agreed there are two equally acceptable methods of making the missed approach. (RT 4347) David Irvine:

"Q Now, with respect to making a missed approach in a Cessna 310 aircraft, there has been testimony that there are two ways to make the approach; one, to apply power and pull up immediately, and there has also been testimony that power can be applied maintaining the same altitude. Do you agree or disagree with those two versions?

"A No sir. I don't disagree, depending on the situation and the possible obstruction.

"Q What do you mean the presence of possible obstruction?

"A Well, there is a possibility—there are many airports and some, of course, are so located geographically that you do have an obstruction on climbout, and at that point you do need altitude.

"Q Is that true or not at Los Angeles Airport?

"A It is not true.

"Q In your opinion as a pilot is either method acceptable?

"A It certainly is."

(RT 4389):

"The Court: Do you think it was reasonable and prudent for this pilot to travel at a height of somewhere under 150 feet, say 100 to 200 feet, with flaps down, gear down and full power, for a period of 3000 feet after he made up his mind to execute a missed approach?

"The Witness: No sir, I do not think it was unusual.

"The Court: My question was do you think it was prudent and reasonable?

"The Witness: I believe it was prudent and reasonable."

(RT 4400):

"The Court: Let me see if I understand you. Do I understand you to say that this would be reasonable and prudent if flaps and gear were started to be retracted during that 30 seconds or 3000 feet going down the runway?

"The Witness: Yes, sir.

"The Court: But it would also be reasonable and prudent to not pull up the flaps and gear during that 30 seconds or 3000 feet down the runway? Either procedure, as I understand you, is prudent?

"The Witness: Either procedure in that 30 second intervall."

And, similarly, in the testimony of Government pilot witness, John McCormick (RT 3758):

"The Witness: * * * It is kind of a coordinated effort. You can do it another way. You can just go full power and let the air speed pick-up while maintaining altitude. But the prudent way is to start climbing up right away.

"The Court: I heard some talk about you sacrifice speed for altitude or you sacrifice altitude for speed. You can't get them both at the same time, is that right?

"The Witness: Let me put it this way: supposing you are close to the stall point in space and the pilot wants to recover from this situation. The full power application is made. He has plenty of altitude underneath him. So, he will lower the nose of the aircraft and pick up his air speed before he starts to climb.

"But, you don't necessarily have to do it that way. You could apply full power, maintain what altitude you have, and then milk up the flaps which is providing the high drag that is keeping your aircraft slowed down, and allow it to accelerate. At the same time you are climbing slowly.

"The Court: Are both ways approved ways?

"The Witness: It depends on where you are. If you are low enough or too low to sacrifice any altitude, then you are stuck with this other way. I won't say stuck, but I will use the other method.

"The Court: Which is to get speed first and then try for altitude?

"The Witness: Hold your altitude and get your power on and allow the speed to gradually pick up in the climb while you bring up your drag items which are the flaps. * * *"

(RT 3761):

"The Court: I heard one witness, and I thought he said—and I wonder if you think it is right—say that you are coming in and are about to land like that. If you suddenly decide you have to make a missed approach, since you have plenty of room out there, nothing but runway and ocean, the important thing is not altitude but speed. You have plenty of room out there to get high enough speed, so that when you do start to climb you won't stall. So, you move up instead of flopping around.

"The Witness: This is one technique. There is no problem with this.

"The Court: Is it a good technique?

"The Witness: It is a good technique, sure. There is no problem there. But, it could be done the other way."

And in another answer at page 3763:

"A * * *But, the other way is used. It is just a matter of choice. * * *"

And, again, in response to questions on cross-examination (RT 3972):

"Q With respect to the character of the missed approach about which you testified yesterday, you agree, do you not, that there are, at least, two optional ways in which to make a missed approach; is that right?

"A Right.

"Q One you can apply power and pull up immediately, is that correct? And another, you can apply power maintaining the same altitude and milk the flaps up?

"A That is correct.

"Q And let the airplane gain speed at that altitude?

"A Correct."

In addition to the above, the final instruction of the PAR Controller to the pilot should be taken into account. The pilot was expressly directed to "climb to VFR conditions on top" which is a distinct variation from the missed approach procedure which prescribed climbing to 2000 feet in a distance of 20 miles. From all the evidence before the Court, it would appear that the obstructing fog layer over the runway was shallow and flat and that the Cessna was proceeding above it over the runway which would constitute a strict adherence to the Controller's instruction, i.e. it had proceeded to "VFR conditions on top." The pilot's observance of the Controller's directive, even if erroneously given, would furnish an additional reason why the pilot did not climb out immediately.

This finding of the Court that the pilot was not guilty of contributory negligence is, of course, not essential to the judgment in favor of the passenger Plaintiffs and ground Plaintiffs; and those Plaintiffs are obviously not bound by this determination upon the issue of contributory negligence of the pilot.

THE DAMAGES OF PLAINTIFFS

This crash occureed in the State of California, and the measure of damages, therefore, is governed by the law of the State of California in force and effect at the time of death. United Air Lines, Inc v. Wiener, 335 F.2d 379, 407-408 (9th Cir. 1964).

Section 377 of the California Code of Civil Procedure provides that in every action for wrongful death, such damages may be given as under all the circumstances of the case may be just.

The decisional law of the State of California teaches that as elements of damages the court shall take into account the pecuniary value of the loss of support, comfort, society, protection and guidance of the decedent suffered by each heir of the decedent.

As a direct and proximate result of the plane crash, the Cessna 310–G airplane was completely demolished. The Plaintiff Eagle Star Insurance Company paid the sum of $82,250.00 under its policy of hull insurance to the Gordon Supply Company and was subrogated in this amount. The Government stipulated that the damages to be awarded to Eagle Star Insurance Company is the sum of $82,250.00.

As a direct and proximate result of the crash, the pilot, James Gordon, met his death. He was 45 years of age at

the time of his death, and had a life expectancy of 27.3 years. He left surviving him as his sole heirs, his wife, Joan Gordon, age 31 years, whose life expectancy exceeded that of the deceased, and five children whose names and ages at the time of his death were as follows: James Prescott Gordon, 16 years; Cynthia Jane Gordon (Sare), 11 years; Deborah Lynn Gordon (Sare), 10 years; Carol Gordon, 9 years; and Judy Gordon, 8 years.

James Gordon was a kind and loving husband and father. He was engaged in the business of real estate and land development and was the sole owner of a corporation known as Gordon's Supply Company, in which name he transacted most of his business. He was earning substantial sums of money each year in his business and was experienced and accomplished therein. He contributed substantial sums of money each year to the support of his family, afforded care, protection and guidance to his wife and children, and had evidenced his desire that his children have a college education and be suitably provided for. The pecuniary value of the loss of support, comfort, society and guidance to his wife and family is the sum of $683,180.00. Said sum shall be distributed as follows:

James Prescott Gordon	–$32,000.00;
Cynthia Jane Gordon (Sare)	–$44,000.00;
Deborah Lynn Gordon (Sare)	–$46,600.00;
Carol Gordon	–$48,800.00; and
Judy Gordon	–$51,200.00.

The balance thereof, $460,780.00, plus the sum of $2,500.00 as the cost of decedent's funeral, is awarded to his widow, Joan Gordon.

Bervial Carrington, a passenger in the airplane, was killed as a direct and proximate result of the accident. At the time of his death, he was 44 years of age, and had a life expectancy of 28.4 years. He left surviving him his widow, Edith Carrington, age 48 years, whose life expectancy exceeded that of the decedent. Mr. Carrington was a kind and loving husband, was earning a substantial income in the carpet business and was contributing substantial sums each year for the care and maintenance of his wife. The Court finds that Edith Carrington suffered pecuniary loss by reason of the loss of support, comfort, society and guidance of her late husband in the sum of $358,775.00, and that she suffered damage by reason of the funeral expenses in the sum of $2,500.00, or a total of $361,275.00. It was stipulated that the Government is entitled to a credit of $50,000.00 as against this award. The net recovery by Edith Carrington is, therefore, the sum of $311,275.00.

Further, as a direct and proximate result of the accident, Dale Dexter Lightenburger, another passenger in the airplane, was killed. At the time of his death he was 42 years of age and at one time had been employed by Lloyd S. Sheppard. Mr. Sheppard had been engaged in the furniture business since 1936, had owned his own furniture business in Las Vegas, Nevada, from 1948 to 1966 and has since then owned an interior decorating and contract business in Las Vegas, Nevada. Sheppard employed Dale Dexter Lightenburger as a furniture salesman in about 1955. Lightenburger remained in Sheppard's employ until 1960, during which time Lightenburger became a sales manager, whose duties included determining credit, working with apprentice salesmen, advertising, and management of the business. Lightenburger, as a sales manager, was entitled, in

addition to the ordinary compensation, an override over the business of all the salesmen, whereas an ordinary salesman received a percentage of only his own sales. In 1960 Lightenburger left Sheppard's employ in Las Vegas, Nevada, to take a better opportunity in Los Angeles, California, but in 1962, Sheppard persuaded Lightenburger to return to his firm in Las Vegas. Lightenburger had the capacity to earn as much as $2,400.00 per month in commissions. The trend of furniture business in the Las Vegas market has been consistently upward for ten years owing to the population growth.

Lightenburger remained until about November 10, 1962, when he signed an employment contract with Carrington Carpet Company.

Lightenburger had an established earning capacity as a manager of a furniture business in the Las Vegas, Nevada area at the time he entered into an employment contract with Carrington Carpet Company.

Carrington Carpet Company was an established furniture business in Las Vegas, Nevada, at the time it contracted to employ Lightenburger. The sales of Carrington Carpet Company had progressively grown as follows: $186,935.67 in 1960, $385,085.66 in 1961, and $578,050.80 in 1962. The sales of Carrington Carpet Company would have naturally and probably increased at least five per cent per annum. Carrington Carpet Company had previously demonstrated a nine per cent rate of return on sales as its net profit.

Under the terms of the Carrington-Lightenburger employment contract, Lightenburger was entitled to the following future earnings: $200.00 weekly plus a three percent commission on merchandise Lightenburger sold,

and in addition thereto, a share of projected net profit (after deduction of $350.00 per week for Carrington's salary) as follows: 20%–1963, 25%–1964, 30%–1965, 35%–1966, 40%–1967, and 40% thereafter. The terms of said employment contract would probably have continued after the period provided for therein. It is probable that Lightenburger would personally have accounted for fifteen percent of the total sales of Carrington Carpet Company each year and that Lightenburger would have received three per cent commission on such sales.

The probable expenditure by Lightenburger for his self-maintenance would have been sixteen per cent of his income.

The probable income of Lightenburger, the deduction of ten per cent business expenses and deduction for income taxes, and the probable contributions to his widow and children, discounted at 4¼% per annum, constitute the basis for determining the present value of Lightenburger's net earnings available to his widow and three children.

Lightenburger was 42 years old at the time of his death, and he had a work-life expectancy of 23 years. His life expectancy did not exceed that of his widow and three children. At the time of the death of the decedent Lightenburger, his widow, Geraldine L. Lightenburger was 34 years of age, and the ages of his three children were as follows: Gregory Dale Lightenburger–7 years; Denise Sue Lightenburger–10 years; and Madylon Leslie Lightenburger–11 years.

The present value of the net earnings available to Lightenburger's widow and three children is $368,344.00. Of this amount, $338,344.00 shall go to

Geraldine L. Lightenburger, and $10,000.00 shall go to each of the three minor children.

Lightenburger was a strong family man; he was a good father, having adopted two of the minor children; the family was close; and he gave a substantial amount of his time to his family. The present value of the loss of probable future companionship, society and comfort was $25,000.00 by Geraldine L. Lightenburger and $10,000.00 by each of the three children.

A $1,242.48 funeral bill was paid by Geraldine L. Lightenburger, for which she is entitled to recover.

Therefore, the Lightenburger Plaintiffs are entitled to receive as follows:

Geraldine L. Lightenburger	–	$364,586.48;
Gregory Dale Lightenburger	–	20,000.00;
Denise Sue Lightenburger	–	20,000.00; and
Madylon Leslie Lightenburger	–	20,000.00.

As a result of this crash, two planes owned by Plaintiff North American Aviation, Inc., a corporation, which were on the ground at the time, were partially burned and damaged. North American Aviation, Inc., a corporation, is entitled to receive the sum of $53,415.61 for the reasonable cost of repairing its planes and the reasonable value of renting substitute planes while they were being repaired.

At the time of the crash, Plaintiff Ivory Combs was working on one of the planes on the ground while acting as an employee of Plaintiff North American Aviation, Inc. The force and violence of the crash caused a quantity of flaming gasoline to be hurled in and around the area where Plaintiff Ivory Combs was working, thereby

causing him to be knocked to the ground and requiring him to crawl through the gasoline flames on his hands and knees in order to save his life, thereby causing serious and permanent bodily injuries. These injuries required hospital, medical and surgical care, and also resulted in both temporary and permanent disabilities. North American Aviation, Inc., pursuant to the provisions of the California Workmen's Compensation Laws, expended the sum of $12,888.55 for hospital, medical, surgical, temporary disability compensation benefits and permanent disability compensation benefits furnished to its employee, Ivory Combs, and which resulted from the injuries received as a result of the crash. By reason thereof, North American Aviation, Inc., is entitled to payment of its subrogation calim for workmen's compensation benefits furnished to Ivory Combs in the sum of $12,888.55 in addition to the aforesaid damages to the two planes. By reason of the foregoing items and elements of damages, Plaintiff North American Aviation, Inc. is entitled to receive the total sum of $66,304.16.

At the time of the crash, Plaintiff Ivory Combs was 57 years of age, in good health, and with a life expectancy in excess of 16 years. He was steadily employed as an engineering flight test chief mechanic by Plaintiff North American Aviation, Inc. for whom he had worked steadily for over twenty years. The injuries sustained by him as a result of the crash included extensive, severe and painful second and third degree burns of the head and face extending from the forehead to the chin, including both eyes, the outer and inner area of the lip and mouth, with permanent scarring of the burned areas and with permanent loss of pigment in the skin, with burning, stinging and watering of the eyes, and with periodic blister formation on the face; extensive,

severe and painful second and third degree burns of both hands and wrists with the burns involving the tendons of both hands with extensive loss of skin of both hands and with extensive permanent scarring of the skin of both hands with permanent loss of pigment of the skin of both hands and with permanent stiffness and weakness of both hands, including the thumbs and fingers whereby there is a permanent loss of approximately 50 per cent of the strength of the left and 60 per cent of the right, or major hand, with a 25 per cent loss of motion of both hands and a 25 per cent loss of flexion of the wrists of both hands; a fracture of the scaphoid bone of the left wrist with permanent pain and weakness resulting therefrom; a severe bursitis of the left elbow, causing pain and disability and suffering for approximately eight months; the causing of permanent thin, tissue-like skin of both hands and wrists, which are tender and require ointments daily to prevent drying and cracking, and which require wearing of gloves while working to prevent pain and injury to the hands; loss of normal feelings in the skin of both hands whereby the danger of further injury is increased; loss of normal blood supply to both hands whereby healing in the event of injury is impaired and the danger of infection is increased; severe and prolonged physical and mental pain, suffering, worry and anxiety since the time of the accident in 1962. Plaintiff Ivory Combs will probably suffer further physical and emotional pain, suffering, worry and anxiety intefmittently for the balance of his life. He returned to light work provided by his employer North American Aviation, Inc., on October 30, 1963, and has been able to continue working for the company thereafter, despite his serious and permanent disabilities, which limit and handicap him in his work, due to the tolerance and cooperation of

North American Aviation, Inc., in permitting him to work with his physical handicaps resulting from the crash. The injuries and permanent disabilities resulting therefrom permanently disable Plaintiff Ivory Combs from competing in the open labor market for work with an employer other than North American Aviation, Inc. He had a normal future earning capacity of four years after reaching the normal retirement age of sixty-five, had he not been injured in the crash. This earning capacity was destroyed by the injuries received in the crash. At the time of the crash, he was earning $135.60 per week. Had he not been injured, his earnings would have increased to $136.00 per week on January 27, 1963, and to $139.20 per week on October 25, 1963. He received $70.00 per week from North American Aviation, Inc. as workmen's compensation on benefits from December 7, 1962 until he returned to work on October 30, 1963, thereby making his net loss of earnings for the period the sum of $3,024.70. He is presently earning $166.00 per week, which equals $8,632.00 per year. Upon retiring at the age of sixty-five, he will receive $200.00 per month or $2,400.00 per year, which results in a net loss to him of $6,232.00 per year for the four years he would normally have worked beyond the age of sixty-five had he not been injured and for which he is entitled to be compensated in the sum of $24,928.00. In addition to the foregoing damages for loss of past and future earnings and earning capacity, Plaintiff Ivory Combs is entitled to receive general damages for his aforesaid injuries and their consequences, past and future, in the sum of $47,047.30, thereby making an aggregate total judgment of $75,000.00 which Plaintiff Ivory Combs is entitled to receive separate from and in addition to the workmen's compensation benefits received by him from North

American Aviation, Inc. and for which North American Aviation, Inc. is entitled to be separately reimbursed and paid as hereinbefore set forth.

The foregoing Opinion prepared and now rendered by the Court shall and does constitute the findings of fact and conclusions of law required by Rule 52 of the Federal Rules of Civil Procedure.

Let judgment be entered accordingly.

APPENDIX F

[Extract from Opening Brief of Appellant - United States]

SUMMARY OF ARGUMENT

The sole proximate cause of the accident was Gordon's decision to initiate the approach under known existing adverse weather conditions and the manner in which he thereafter operated the aircraft. The District Court erred in finding a breach of any legal duty by the precision radar approach controller which proximately caused the accident. From the evidence, no one can say with any reasonable probability what caused the aircraft to enter the violent maneuver that it did. What is clear is that the crash would not have occurred if Gordon had not persisted in an approach into an airport reporting zero-zero weather, or if he had properly executed a missed approach. Assuming, *arguendo*, that some negligence could be found in the Government's advisories to Gordon during the approach, *the evidence shows that the aircraft was seen by the Airport Surface Detection Equipment controller over the center of the runway and proceeding down it for about 3000 feet before the target was seen turning left on taxiway 22. The radar approach to the runway as such had been completed successfully.* The aircraft was seen to proceed more than 1000 feet past the PAR radar touchdown point and PAR radar capabilities. *It was not until after the aircraft had departed the runway that the efficient cause of the injuries occurred.* The aircraft crashed on a heading about opposite the runway heading and in a nose down left bank of about 30 degrees. This unusual attitude of the aircraft was the efficient cause of the crash. It would not

have occurred had a proper missed approach been executed. [Emphasis appellant's.]

* * * * *

If any negligence on the part of the Government should be shown, the Government still should not be liable since the pilot's failure to execute a proper missed approach procedure was an independent intervening act which was not foreseeable.

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APPENDIX G

[Extract from Reply Brief of Appellant - United States]

With gear and flaps still down at impact and having failed to initiate a climb during the 35 crucial seconds, the pilot violated the final missed approach instruction.

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-320

GERALDINE L. LIGHTENBURGER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 460 F.2d 391. The opinion of the district court (Pet. App. 1e-75e) is reported at 298 F. Supp. 813.

JURISDICTION

The judgment of the court of appeals was entered on April 27, 1972 (Pet. App. 1b-2b). A timely petition for rehearing was denied on May 26, 1972 (Pet. App. 1c-2c). The petition for a writ of certiorari

was filed on August 24, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals properly set aside as clearly erroneous the findings of the district court that an airplane crash had been proximately caused by the negligence of the government.

STATUTE AND REGULATIONS INVOLVED

28 U.S.C. 1346(b) provides:

> Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

The Air Traffic Control Procedures Manual provides in relevant part:

Section 344.9:

> If an aircraft exceeds the lower and/or lateral limits of the prescribed safety zone to a point where, in the judgment of the controller, safety

of flight is likely to be affected, the pilot shall be instructed to climb to a specified altitude and fly a specific course, as appropriate.

* * * * *

Section 394.7:

To instruct a pilot to discontinue approach when the aircraft exceeds safety limits: IF RUNWAY NOT IN SIGHT, CLIMB IMMEDIATELY TO (altitude), TURN LEFT/RIGHT, HEADING (degrees), (Reason and further clearance, if appropriate), ACKNOWLEDGE.

* * * * *

Section 411.7:

When controllers foresee the possibility that departing or arriving aircraft might encounter rotorcraft downwash, thrust stream turbulence or wing tip vortices from preceding aircraft, cautionary information to this effect should be issued to pilots concerned.

NOTE.—Since the existence and effect of turbulence is unpredictable, the provision of the above information does not constitute the placing of responsibility on controllers to anticipate in all cases the need for such information.

STATEMENT

Petitioners brought this action under the Federal Tort Claims Act, 28 U.S.C. 1346(b); for damages resulting from the crash of a private airplane at Los Angeles International Airport, in which three persons were killed. The district court entered judgment for the petitioners, and the court of appeals reversed.

The plane, a Cessna 310G piloted by James Gordon, flew to Los Angeles from Las Vegas under an instrument flight plan. At 3:52 p.m. Gordon made contact with the Los Angeles Approach Radar Control and learned that the weather conditions were poor. With visibility deteriorating, Gordon elected to make a precision radar approach (PAR) (Pet. App. 3a).[1] At approximately 4:00 p.m., on the same radio frequency as that to which Gordon was tuned, Radar Control informed a United Airlines jet that the pilot of an American Airlines Boeing 707 ahead of the United flight had executed a missed approach when he could not see the runway (Pet. App. 3a, 7e). As a result, the United pilot declined to attempt to land (*ibid.*). This information, however, did not dissuade Gordon from attempting to land.

At 4:04 p.m., when Gordon was seven miles from touchdown, he was placed under the control of the PAR controller, who informed Gordon that "this approach will be terminated at the middle marker one-half mile from touchdown" (Pet. App. 4a). At that point, Gordon would either have to complete the landing visually or execute a missed approach.

At 4:06 p.m., Gordon entered on the designated glide path for the radar approach to the airport. When Gordon was three miles from touchdown, the PAR controller informed him, "latest weather indefinite ceiling zero sky obscured visibility zero with

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[1] On this type of approach, a special PAR controller guides the pilot down towards the runway; however, the pilot must conduct the actual landing visually (Pet. App. 7e-8e).

fog RVR[2] less than 1000 feet." The PAR controller asked Gordon whether he still planned to continue his approach in this weather, and Gordon answered "Ah put me right down on the runway" (Pet. App. 4a).

When Gordon was one mile from touchdown, the PAR controller told Gordon that he was a few feet above the glide path (Pet. App. 5a). At 4:10 p.m., with Gordon one-half mile from touchdown, the controller stated:

> Now oh ah fifteen feet from the glide path still a half mile from touchdown turn right one degree two five zero you're lined up with the left shoulder of the runway you passed the middle marker now coming up over the highway and going twenty five feet below the glide path adjust descent take over and complete your landing visually on runway two five left if you're not ah contact execute a missed approach climb westbound to VFR conditions on top. [Pet. App. 5a.]

Following this communication, the pilot apparently began to execute a missed approach by flying straight ahead and adding power, in preparation for climbing (Pet. App. 13e, 55e-65e).[3] The plane flew over the runway for 3000 feet at an altitude of 150 feet, going 1500 feet beyond touchdown (Pet. App. 5a). At approximately 4:12 p.m., the plane made a sudden vio-

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[2] The RVR (Runway Visual Range) is the measured visibility on the runway.

[3] An alternative method of conducting a missed approach is immediately to climb sharply (Pet. App. 65e).

lent 210 degree turn and crashed into a parking lot (*ibid.*). The plane's three occupants were killed, a North American Aviation employee on the ground was injured, and property of North American Aviation was damaged.

The district court found that the accident resulted from the government's negligence and awarded petitioners more than $1.6 million in damages. It concluded that the crash was caused by the Cessna encountering the wing tip vortices (*e.g.*, swirling turbulences created by a plane's wings (Pet. App. 15e-16e)) that had been created on the missed approach of the American Airlines jet some 12 minutes earlier:

> The evidence excludes any failure on the part of the pilot or the aircraft. The final violent maneuver was beyond the controlled capacity of the aircraft. The Court necessarily finds that it occurred as the result of turbulence from wing tip vortices, the only outside force acting upon the aircraft. [Pet. App. 53e.]

Further, the court found that the controller should have foreseen the possibility of the Cessna encountering the jet's vortices (Pet. App. 31e-32e). The district court determined that the government was liable on four separate theories:*

(1) That the PAR controller was negligent in that he knew, or should have known, that a hazard existed in the form of wing-tip vortices from the missed ap-

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* The theories are referred to here in the order cited by the court of appeals, not the district court.

proach of the American Airlines plane, and that he breached his duty to warn the pilot of the Cessna of this hazard (Pet. App. 29e-32e).

(2) That the PAR controller was negligent in failing to give the warning required by Section 411.7 of the Air Traffic Control Procedures Manual, the FAA's regulation for circumstances in which a controller foresees the possibility of wing-tip vortices (Pet. App. 45e-50e).

(3) That the PAR controller was negligent in that he gave a series of misleading and improper advisories to the pilot (Pet. App. 32e-44e) which "may well have induced confusion and disorientation in the pilot, exposing him, the passengers in the aircraft and the persons on the ground, and their property, to all reasonably foreseeable hazards, including the disorientation of the pilot and other forces such as the effects of wing tip vortices" (Pet. App. 44e).

(4) That the PAR controller was negligent in failing, although the plane at one point was 25 feet below the glide path, to use the language prescribed by the Air Traffic Control Procedures Manual, Sections 344.9 and 394.7, for this situation in informing the pilot of that fact (Pet. App. 50e-52e).

On the government's appeal, the court of appeals reversed (Pet. App. 1a-15a, 1b-2b, 1c-2c). It accepted the finding that the American Airlines jet's wing tip vortices had been the cause of the crash, but concluded that the district court's finding that it was foreseeable that the vortices presented a hazard to the Cessna was clearly erroneous. As a result, the first two

theories of liability, clearly predicated on the foreseeability of the wing tip vortices, collapsed. The third and fourth theories were similarly clearly erroneous, the court held, since even if the PAR controller was negligent in the advice he gave to the pilot, the failure to give proper advice was not causally connected with the crash, which was due to the unforeseeable wing tip vortices.

ARGUMENT

The ground on which the court of appeals decided the issue raised in the petition was that the negligence of the air traffic controller, if there was any, did not cause the accident. That ruling turns on questions of fact and of state law, is correct, and presents no issue warranting review by this Court.

Petitioners have abandoned the contention that the wing tip vortices created by the missed approach of the American Airlines jet twelve minutes before the crash, which were found to have been the cause of the crash, should have been foreseen by the PAR controller. The sole negligent conduct now relied upon is the failure of the controller to give an instruction to climb immediately in the precise words of the Air Traffic Control Procedures Manual. The court of appeals assumed *arguendo* that this failure constituted negligence but ruled for the government on the ground that the negligence was not the cause of the crash. Petitioners now assert that this decision was contrary to the law of proximate causation in California, contending that foreseeability of the hazard causing the

accident is not essential to establish proximate cause in that State.

This Court ordinarily does not grant certiorari to review decisions of courts of appeals on questions of state law (see, *e.g.*, *Estate of Spiegel* v. *Commissioner*, 335 U.S. 701, 707-708), and this case presents no occasion to depart from that practice. Moreover, the decision of the court of appeals is fully in accord with California law. Petitioners' contention, in essence, is that had the PAR controller instructed the Cessna to "climb immediately" it would not have been in the particular location at which the wing tip vortices were encountered, and the crash would not have occurred. However, California distinguishes between this type of actual cause in the "but for" sense and the legal concept of proximate cause (see *Godwin* v. *LaTurco*, 77 Cal. Rptr. 305, 272 Cal. App. 2d 475); and, contrary to petitioners' assertion, foreseeability is a "principal" element of proximate cause in that State. *Curley* v. *Vick*, 27 Cal. Rptr. 501, 211 Cal. App. 2d 670; *Azcona* v. *Tibbs*, 12 Cal. Rptr. 232, 190 Cal. App. 2d 425.

The court of appeals correctly rejected petitioners' argument that, even though the "climb immediately" instruction was not designed to avoid the hazard of wing tip vortices,[5] the necessary causal relationship

[5] The persistence of wing tip vortices for more than one and a half minutes is extremely rare (Pet. App. 8a), and petitioners' expert witness had never heard of them persisting for longer than six and a half minutes; he characterized the circumstances that caused the crash as "a situation that doesn't happen once in a million landings" (Pet. App. 8a-9a). The

upon which to predicate liability could still be found. California requires that the negligence, to be legally actionable, must give rise to the kind of hazard that caused the injury. See, *e.g.*, *Azcona* v. *Tibbs*, *supra*; *Beard* v. *Atchison, T. & S.F. Ry.*, 84 Cal. Rptr. 449, 4 Cal. App. 3d 129, 140; *Restatement of Torts 2d*, § 430, Comment c. The intervening operation of an extraordinary and unforeseeable force, such as wing tip vortices persisting for an unprecedented twelve minutes, will break the chain of causation. *Ulwelling* v. *Crown Coach Corp.*, 23 Cal. Rptr. 631, 206 Cal. App. 2d 96, 118; *Azcona* v. *Tibbs*, *supra*, 190 Cal. App. 2d at 428; *Restatement of Torts 2d*, *supra*, § 451. Finally, it is clear under California law that where the allegedly negligent conduct entailed a violation of a statute or regulation, it is actionable negligence only when the statute or regulation was intended to afford protection against the harm that caused the accident. *Miglierini* v. *Havemann*, 49 Cal. Rptr. 795, 240 Cal. App. 2d 571; *Hyde* v. *Avalon Air Transport, Inc.*, 52 Cal. Rptr. 309, 243 Cal. App. 2d 88, 92; *Olsen* v. *McGillicuddy*, 93 Cal. Rptr. 530, 15 Cal. App. 3d 897, 902-903. See *Restatement of Torts 2d*, *supra*, § 286, Comment i.*

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court of appeals was justified in concluding that this extraordinary persistence of wing tip vortices was not one of the hazards with which the regulation calling for the "climb immediately" instruction was concerned.

* Petitioners' assertion that the court of appeals invaded the province of the trier of fact in reaching its conclusion on causation is also in error. The court of appeals accepted every pertinent factual conclusion of the district court and

Petitioners also urge review by this Court on the ground that important considerations of air safety are involved in the proper interpretation of the "climb immediately" regulation (Pet. 14-16). But this decision can have no impact upon the safe operation of the air traffic control system, since the decision of the court of appeals entailed no disagreement with the proposition that the "climb immediately" directive should have been given. Petitioners do not challenge the desirability of the regulations in question, which will continue to prescribe the standard of conduct for air traffic controllers in exactly the same fashion irrespective of the outcome of this litigation.

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simply found that the element of causation could not, under those facts, be established as a matter of law. While proximate cause is frequently a question of fact in California, it is not so where the facts are not subject to dispute, and only one conclusion may be drawn from them. *Azcona* v. *Tibbs*, *supra*, 190 Cal. App. 2d at 428; *Ulwelling* v. *Crown Coach Corp.*, *supra*, 206 Cal. App. 2d at 119. In the instant case, there is no question as to what the controller did and said, and the court of appeals accepted the conclusion of the district court as to the cause of the accident. All that remained was for legal conclusions to be drawn from these facts, a matter properly within the province of the court of appeals.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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